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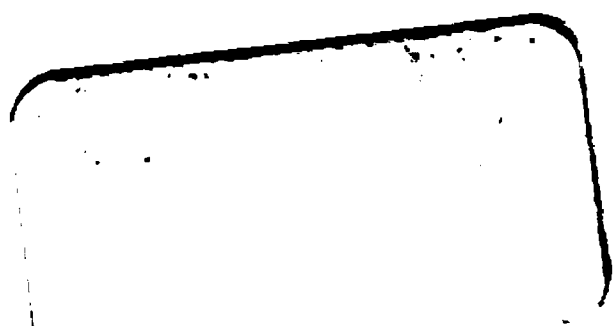
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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

JANUARY 24, 1912 — MARCH 28, 1912

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

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DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 9626. Department One. January 24, 1912.]

UNION TRUST COMPANY, *Trustee etc., Appellant*, v.
BENJAMIN E. AMERY, *Respondent*.¹

LIMITATION OF ACTIONS—RELIEF ON GROUND OF FRAUD—CORPORATIONS—REDUCTION OF CAPITAL STOCK. An action by a trustee in bankruptcy to recover the sum paid to the bankrupt's president on a sale of its capital stock, thereby diminishing the capital stock of the corporation, is one for relief upon the ground of fraud, and is not barred until the lapse of three years after the cause of action accrues, as provided in Rem. & Bal. Code, § 159, subd. 4; in view of Id. §§ 3697, and 3704-3706, making it unlawful to make a dividend or reduce the capital stock of a corporation except in the manner provided.

BANKRUPTCY—TRANSFERS — ACTION BY TRUSTEE — CORPORATIONS—CAPITAL STOCK—UNLAWFUL REDUCTION — FRAUD — SUBSEQUENT CREDITORS. Where a corporation, before bankruptcy, unlawfully reduced its capital stock by purchasing the stock of its president, the trustee in bankruptcy may maintain an action to recover the money paid without alleging the existence of creditors at the time of the unlawful sale; since subsequent creditors are equally entitled to redress.

BANKRUPTCY—FRAUDULENT TRANSACTIONS — ACTION BY TRUSTEE—STATUTES. The bankruptcy act does not require that creditors should first acquire a lien before the trustee can sue to set aside an unlawful transaction in fraud of the rights of creditors.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 9, 1910, upon

¹Reported in 120 Pac. 539.

sustaining a demurrer to the complaint, dismissing an action for money received. Reversed.

Campbell & Goodwin, for appellant.

H. M. Stephens, for respondent.

GOSE, J.—Plaintiff, a trustee in bankruptcy for the estate of Syphers Machinery Company, a corporation, brought this action to recover from the defendant a sum of money paid to him by the bankrupt corporation, for 5,500 shares of its capital stock, purchased from him by the corporation prior to the time it was adjudged a bankrupt. A demurrer to the complaint was sustained, and a judgment of dismissal entered. The plaintiff has appealed.

The complaint, in substance, avers that the Syphers Machinery Company, a Washington corporation, was adjudged a bankrupt in the United States district court, Eastern District of Washington, Eastern Division, on the 6th day of May, 1909; that the appellant, a corporation, was elected as its trustee in bankruptcy on the 3d day of June, 1909, and has duly qualified as such; that the appellant as such trustee was, on the 29th day of November, 1909, granted permission by the referee in bankruptcy to prosecute this suit; that on the 18th day of October, 1906, the bankrupt corporation, in pursuance of an oral agreement, purchased from the respondent, who was then its president and one of its trustees, 5,500 shares of its capital stock, of the par value of one dollar per share, and paid him therefor from the funds of the corporation the sum of \$5,500, and that the capital stock of the corporation consisted of 25,000 shares of stock, of the par value of one dollar per share. It is further alleged:

“That the sale by the said Benjamin E. Amery, otherwise known as B. E. Amery, of the said 5,500 shares of capital stock, to the said Syphers Machinery Company, a corporation, was prejudicial to the creditors of the corporation, in that the creditors have not been paid and the trustee in bank-

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ruptcy, the Union Trust Company of Spokane, has now no funds in its hands with which to pay the debts of the said Syphers Machinery Company, the bankrupt corporation; that the said Syphers Machinery Company, by the sale of the said 5,500 shares of its capital stock, as aforesaid to the said Benjamin E. Amery, otherwise known as B. E. Amery, attempted to reduce and reduced its capital, contrary to law."

The first question presented for our consideration is whether the action is barred by the statute. A reference to the dates stated will disclose that three years had not elapsed between the purchase and sale of the stock and the adjudication of bankruptcy. We think the case falls within the provisions of Rem. & Bal. Code, § 159, subd. 4, which is as follows:

"Within three years,—

"An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

Rem. & Bal. Code, § 3697, provides that it shall be unlawful for the trustees of a corporation "to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company," except as provided by the statute. Rem. & Bal. Code, §§ 3704, 3705, and 3706, make specific provisions for the manner of diminishing the capital stock of a corporation, and expressly require that if the capital stock be diminished, it be made to appear upon the public records in the same manner as is provided for the filing of the original articles of incorporation. The obvious purpose of the statute is to make the public records show the amount of the capital stock of a corporation; in other words, to speak the truth. It follows, therefore, that, where the capital stock has not been diminished in compliance with the statute, the

original articles of incorporation operate as a continuing representation on behalf of the corporation that its capital stock is unimpaired, and that the impairment of its capital stock in any other manner is a fraud upon its creditors, both as to the corporation and all others who participate in or profit by such an act. *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Id.*, 38 Wash. 59, 80 Pac. 172; *Hall & Farley v. Henderson*, 126 Ala. 449, 28 South. 531, 85 Am. St. 53, 61 L. R. A. 621; *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117. As to whether the cause of action accrues and the statute commences to run when the stock is sold, or when insolvency takes place, we need not decide, as three years had not elapsed between the date of the sale and the adjudication of bankruptcy.

The respondent contends that, as the complaint does not allege that there were any creditors when the delict occurred, a cause of action is not stated. The Federal bankruptcy law provides that the trustee of the estate of the bankrupt, upon his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt; that he may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred or its value from the person to whom it was transferred, saving the rights of a *bona fide* holder for value, and that suit shall not be brought by the trustee subsequent to two years after the estate has been closed. 1 Fed. Stats. Ann. p. 565, subd. d.; p. 697, § 70, and p. 702, subd. e. This question was settled adversely to respondent's contention in the *Tait* case in 38 Wash., *supra*. In that case, which was a suit by a receiver of an insolvent corporation, it was contended that the court erred in striking the second affirmative defense, which was in substance that those who were creditors of the corporation when it purchased and attempted to retire a part of its capital stock waived their

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right to object. In discussing this question, at page 163, it is said:

"It does not appear that subsequent creditors had waived their rights to all the assets of the corporation, even conceding—which we do not now decide—that, under the allegations of the answer, the creditors then existing had so waived their rights."

In *Hospes v. Northwestern Mfg. & Car Co.*, *supra*, a creditor's suit against certain stockholders of the corporation who held bonus stock, the court had under consideration the question of the liability of such stockholders to creditors of the corporation who became such after the stock had been issued. In considering this question, at page 198, it is said:

"The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; . . ."

Respondent has cited cases growing out of the construction of the sales in bulk statute in this state, and the conditional sales statute in other states. *Hardwick v. Gettier*, 43 Wash. 644, 86 Pac. 943, falls within the first class, and *Crucible Steel Co. v. Holt*, 174 Fed. 127, and *York Mfg. Co. v. Cassell*, 201 U. S. 344, fall within the second class. In the *Hardwick* case we held that the sales in bulk statute, considering the purpose of its enactment, applies only to creditors existing at the time of the sale. The Federal cases are based upon the construction given to the statutes of the state under which the respective rights were asserted by the state courts. It is apparent that these cases are not in point. *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16, 54 Pac. 763, is more difficult to distinguish. It was, however, based upon essentially different facts from those involved in this case. If not distinguishable upon the facts, it is overruled by the later case of *Tait v. Pigott*. If the re-

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		“ 3697	3
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United States, the said Lewis Makovsky then and there knowing said property, and the whole thereof, to have been stolen; contrary," etc.

The trial court sustained a demurrer to this information, upon the ground that more than one offense was charged, and dismissed the action. The state has appealed.

It is argued by the appellant that the information is sufficient, and not subject to the objection that it is duplicitous under the rule as followed by this court in *State v. Butts*, 42 Wash. 455, 85 Pac. 33; *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037, and *State v. Laws*, 61 Wash. 533, 112 Pac. 488. We are satisfied that the information is sufficient under the rule of those cases.

Counsel for defendant rely upon the rule in *State v. Bliss*, 27 Wash. 463, 68 Pac. 87, which no doubt supports that contention. They seek to distinguish this case from the cases referred to above, by reason of the fact that it was alleged in those cases that the defendant in a certain county on a given date, "then and there being," did take the property. It is apparent, however, that the informations in the *Bliss* case, the *Butts* case, and the *Laws* case are identical in the respect that each contains these same words in the same connection. In the *Laws* case, referring to the case of *State v. Bliss*, we said:

"There are however two decisions of this court rendered since then which have the effect of overruling *State v. Bliss*, and clearly support the contention here made by the learned prosecuting attorney, that the information does not charge more than one crime. They are *State v. Butts*, 42 Wash. 455, 85 Pac. 33; and *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037. The holding in these cases seems to be supported by the great weight of authority."

By this statement there can be no doubt that we there expressly overruled *State v. Bliss*. We then quoted from *Furnace v. State*, 153 Ind. 93, 54 N. E. 441, as follows:

"We recognize no good reason to depart from what may be considered the great current of authority and hold the

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pleading in question bad, when it can reasonably be said that it discloses that the larceny complained of was but a single act or transaction in violation of the law against larceny, although the property which was the subject of the crime belonged to several different persons. The particular ownership as charged in the pleading, of the money stolen did not give character to the act of stealing it, but was merely a part of the description of the particular crime charged to have been committed. The information, *prima facie*, under the circumstances, can be said to charge but one offense against the state, and is not open to the objection that it is bad for duplicity."

In this case, the information charges the defendant with larceny by buying, receiving and concealing stolen property. It recites that the defendant, in a certain county, on a certain day, with intent to deprive the owner thereof, "feloniously did buy, receive, and aid in the concealment of the following described stolen property." Then follows a description of the property and its value. The information then recites: "The said Lewis Makovsky then and there knowing the said property and the whole thereof to have been stolen." It is apparent that this clause refers to the time and place when and where the property was received, and brings the information within the rule in *State v. Laws*. To a person of common understanding, it would readily appear from the information that the property was all received at the same time, at the same place. This is the test. *State v. Duxinman*, 34 Wash. 257, 75 Pac. 814. We think there is no inference in the information that the property was purchased or received or concealed at different times, even though it belonged to different persons. The information was therefore sufficient.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer.

DUNBAR, C. J., FULLERTON, MORRIS, and ELLIS, JJ., concur.

[No. 10015. Department One. January 25, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Georgiana S. Ford et al., Plaintiff, v. THE SUPERIOR COURT FOR THURSTON COUNTY et al., Respondents.*¹

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—EXCLUSIVE FRANCHISE—STREET RAILWAYS. Rem. & Bal. Code, § 9080, providing that a city may grant authority for the construction of electric railways upon, over, along and across any public street and prescribe the grade or elevation at which the same shall be maintained, authorizes the city, by clear and unmistakable language, to grant a franchise giving a street railway company the right to build a track on a trestle in a portion of the street, excluding the public therefrom, upon condemnation of the abutter's easements of access, light, and air, under Id., § 9081.

Certiorari to review an order of the superior court for Thurston county, Mitchell, J., entered October 25, 1911, adjudging a public use and necessity in condemnation proceedings, after a hearing before the court. Affirmed.

G. C. Israel, Frank C. Owings, and Thos. L. O'Leary, for relators.

Troy & Sturdevant and A. J. Falknor, for respondents.

GOSE, J.—This is an application for a writ to review a judgment of necessity entered in an eminent domain proceeding. The respondent Olympia Light & Power Company has for several years operated an electric street railway system in the city of Olympia, and between that city and Tumwater. On the 5th day of May, 1911, the city of Olympia granted it a franchise to extend its railway system to what is known as West Olympia. The ordinance provides:

“That said Olympia Light & Power Company is hereby authorized to erect a trestle to carry its tracks over the Port Townsend & Southern Railroad, said trestle to be located on the southerly side of Fourth street, and to extend from

¹Reported in 120 Pac. 514.

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a point at or near the drawbridge to a point at or near the intersection of Fourth and Front streets. Plans and detailed specifications for said trestle to be approved by the city engineer and the city council, and said trestle to be constructed in accordance therewith."

Pursuant to the franchise, the respondent, while taking the initial steps to construct the trestle, was enjoined by the court from constructing it, until it had appropriated the easements of access, light, and air of the relators. Thereafter, in a suit instituted by the respondent for that purpose, an order was entered declaring, that the proposed trestle was necessary, that the public interest required its construction, and that the easements of access, light, and air sought to be appropriated were necessary in the prosecution of the enterprise. The relators thereupon applied to this court for a writ of review. The proposed trestle will commence north of the sidewalk area on the south side of Fourth street, at or near the east end of the drawbridge, and extend west a distance of six hundred and forty feet, to a point near the intersection of Fourth and Front streets. Where it crosses the track of the Port Townsend & Southern railway, it will have a height of twenty-two and thirty-six hundredths feet. From thence to the point of contact with the street, it will have an ascending grade of approximately three per cent. The base of the trestle will have a width of sixteen feet at the east side of the relators' property, and ten feet at its point of contact with the street near the west line of their property. The top of the trestle will be ten feet in width. The driveway in the street north of their property will vary in width from twenty-seven and two-tenths feet, at their east line, to thirty feet at the west end of the trestle. The relators' property lies between the track of the Port Townsend & Southern Railway Company and Front street, and abuts upon the south side of Fourth street. There will be no interference with the sidewalk area. The purpose of the trestle is two-fold; (1) to avoid a grade crossing at the

railway track; and (2) to give the street car track a better grade between that track and the west end of the trestle. The railroad track lies in a depression between the draw-bridge and the west Fourth street hill. West Fourth street in front of the relators' property has a grade of approximately twelve per cent.

The relators' contention is that the city did not have the power to authorize the construction of the trestle or to permit the laying of the street car track except at grade. Respondent contends that express authority for the granting of the franchise, including the construction of the trestle, is conferred by the provisions of Rem. & Bal. Code, §§ 9080 and 9081. Section 9080, so far as applicable to the present inquiry, is as follows:

"The legislative authority of the city or town having control of any public street or road, or where such street or road is not within the limits of any incorporated city or town, then the board of county commissioners wherein such road or street is situated, may grant authority for the construction, maintenance and operation of electric railroads or railways, motor railroads or railways and railroads and railways of which the motive power is any power other than steam, together with such poles, wires and other appurtenances upon, over, along and across any such public street or road and in granting such authority the legislative authority of such city or town or the board of county commissioners, as the case may be, may prescribe the terms and conditions on which such railroads or railways and their appurtenances shall be constructed, maintained and operated upon, over, along and across such road or street, and the grade or elevation at which the same shall be maintained and operated."

Section 9081 confers the right upon railway companies operated by electricity to appropriate "real estate and other property for right of way or for any corporate purpose," subject to the condition that the right of eminent domain cannot be exercised with respect to any public road or street until the location of the road has been authorized in accordance with the provisions of § 9080.

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Relators rely upon *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576. In that case we held, after reviewing the legislation applicable to commercial railroads, that the city of Spokane had no authority to grant a franchise to a commercial railroad to lay its track below the grade of the street so as to exclude the public from the part of the street occupied by the railroad. The statute under review in that case gives to cities of the first class the power to authorize the construction and operation of commercial railroads "in, along, over or across" any street, etc., and to prescribe the "duration and condition" of such use. *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44, and *Lake Shore & M. S. R. Co. v. Elyria*, 69 Ohio St. 414, 69 N. E. 738, are quoted from at length in the opinion in the *Schade* case. These are cases involving the right of commercial railroads to place piers and abutments in the street. In the *Buffalo* case the legislative authority was to construct roads "across, along, or upon" any street with the assent of the municipal authorities. In the *Elyria* case the statute relied upon as conferring the power provided:

"If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms, and conditions upon which the same may be used or occupied."

The rule announced in the *Schade* case is that the power of the municipal authorities to permit the exclusive use of any part of its street by a railroad must be granted by the state, by "clear and unmistakable language." In the *Buffalo* case it is said that the authority of the city must appear "in express terms or by clear and unmistakable implication." In the *Elyria* case the court said that the authority of a municipality to grant more than a joint occupancy of the

way "required clear and express language in the statute to that effect."

It is not questioned that the state, in the exercise of its sovereignty, may confer upon municipal officers the power to permit either a street railway company or a commercial railroad to construct its track either above or below the grade of the street, and thus destroy the common public user of the portion of the street thus occupied. The question here presented is, has the legislature conferred this power upon the city of Olympia, to quote from the *Schade* case, by "clear and unmistakable language." We think it has. Any other construction would, we think, nullify the plain meaning of the words "and the grade or elevation at which the same shall be maintained or operated." The statute gives authority to the law-making power of the city to grant the right to construct, maintain, and operate electric railways and railroads having other than steam power, "upon, over, along and across" any public street, to prescribe "the terms and conditions" of their construction, maintenance and operation "upon, over, along and across" the street, and to prescribe "the grade or elevation at which the same shall be maintained or operated." If the legislature did not intend to authorize the city authorities, in the judicious exercise of the powers conferred upon them, to authorize the construction of a railway track at least above grade, the word "elevation" is surplusage and must be rejected and read out of the statute. It seems clear that the legislature contemplated that the contour of a street might be such that the public safety would require the road to be constructed and operated above grade. The construction contended for by the relators would, we think, render the meaning of the words "grade or elevation" meaningless. It is the duty of the courts in construing statutes to give effect to all the words found in the statute, if possible, and as was said in the recent case of *State v. Whitney*, 66 Wash. 473, 120 Pac. 116, to neither en-

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large the terms of the statute by ingenious reasoning, nor diminish them by strained construction.

The relators say: "The conferring of the power to prescribe the grade or elevation simply means that the legislature has said to the city council that you may have the power and authority to protect the inhabitants of the city whom you represent officially against any public service corporation attempting to fix its line at an improper grade or elevation." This argument is hardly in harmony with the contention that the city had no power to permit the construction of the road except upon the surface of the street. Moreover, such authority had already been conferred upon the council by the use of the words "upon, over, along and across," and by the further provision giving it the power to prescribe "the terms and conditions" upon which such roads shall be constructed, maintained, and operated. If the law-making body of the state had intended that street car tracks could only be laid level with the surface of the streets, and in conformity with the grades then or thereafter established, we think such intention would have been expressed in words reasonably tending to convey that meaning. We think, construing the statute according to the plain and ordinary meaning of the words employed, the city was warranted in requiring a grade separation. In the *Schade* case we said: "We are not concerned here with the right of any public service corporation save that of a railway company." In that case, we were dealing with the rights of a commercial railway, and the language there used must be read in the light of that fact. As was said by Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat., at page 399:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. . . . The reason of the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but

their possible bearing on all other cases is seldom completely investigated."

We are prompted to make these suggestions because we have not considered the respondent's further contention that the power of condemnation given to street railway companies by the provisions of § 9081 carries with it, by necessary implication, the power to destroy the right of common public user in the portion of the street to be occupied by the railway company. It was argued at the bar by the respondent that an abutting owner cannot claim compensation where a street car track is laid upon a level with the street grade, and that it follows that the authority given to street railway companies to exercise the right of eminent domain in the streets necessarily implies the right—the city assenting—to separate the track from the street grade. It is, of course, not questioned that street railways facilitate street travel, and that commercial railways are not designed or operated for that purpose. Finding express power in the statute for the franchise as granted, we do not find it necessary to decide this question.

The writ is denied.

DUNBAR, C. J., CROW, and PARKER, JJ., concur.

CHADWICK, J. (concurring)—I concur in the result, upon the second ground stated in the opinion but not decided by the majority. I am led to take this view because of the fact that it is only in cases of grade separation that an abutting owner is entitled to damages. In view of this fact, the right of condemnation conferred by Rem. & Bal. Code, § 9081 would be rendered meaningless if it did not carry with it the power to permit the precise condition presented by the case at bar. The *Schade* case has been properly distinguished by Judge Gose. The company there involved was a steam railroad, and the decision was correct. But in arriving at its conclusion, I think the court must have overlooked the distinction which Judge Gose has pointed out, and used ex-

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pressions which were calculated to mislead, and which have in fact encouraged this proceeding. In the *Schade* case will be found the following broad statement:

"It seems to us that a railway company given the use of a public street, under the powers of the city council here invoked, must be given that use, if it is to occupy any of the surface of the street, upon substantially the same terms as any other traveler upon such street may use it; that is, a free passage along the portion of the street surface so granted, when it is not in the actual use of some other traveler."

This expression is inadvertent, and as I read the cases, is not sustained by reason or authority. Under its general police power, a city can, if the safety or welfare of the citizen demands it, say that a part of a street shall be given up to pedestrians, and a part to vehicles; that certain vehicles shall not go upon certain streets; or, as was held in the New York Elevated Railway cases, a grade separation may be ordained. While rights in a street are, as between the pedestrian and the vehicle—be it street car, wagon, or automobile—mutual, the city may, for the safety of either, or the convenience of the general public, give over a part of the street to one class, although technically it may seem that the use is exclusive. The remedy of the abutting owner is to take his damages.

[No. 9638. Department One. January 26, 1912.]

WALTER E. LEIGH, *Respondent*, v. G. A. YANCEY *et al.*,
Appellants.¹

FRAUDS, STATUTE OF—BROKERS—COMMISSIONS—ORAL CONTRACT. Rem. & Bal. Code, § 5289, providing that an agreement employing an agent or broker to sell real estate for compensation or commissions shall be void unless in writing, applies only to contracts between the owner of the land and the agent to sell, and an oral agreement between brokers whereby one was to pay the other a specified commission for assistance in finding purchasers is enforceable.

Appeal from a judgment of the superior court for Spokane county Huneke, J., entered January 21, 1911, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

Happy, Winfree & Hindman, for appellants.

Graves, Kizer & Graves, for respondent.

PER CURIAM.—The complaint alleges, and the findings show, that the defendants, appellants here, were partners engaged in the real estate business, in the city of Spokane, and were also engaged in selling farm lands for the Canadian Pacific railway, in the Province of Alberta, in the Dominion of Canada; that, on or about the 1st day of April, they agreed with the plaintiff, respondent here, that, if the plaintiff would send to, or introduce to defendants, persons who were interested in Alberta farm lands, the defendants would pay to the plaintiff fifty cents per acre on nonirrigated lands for all acres thus sold to persons so sent; the plaintiff having nothing to do with fixing the terms and conditions of the sale, such terms and conditions to be such as defendants chose to make, or had authority from the owners of the lands to make. Thereafter the plaintiff, under said contract, sent certain persons to the defendants, and the defendants showed

¹Reported in 120 Pac. 512.

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Opinion Per Curiam.

the lands thereafter purchased to said persons, and conducted negotiations with them which resulted in the selling of lands to said persons; and that the fees or amount of services, as agreed upon per acre, above mentioned, under such sales, amounted to the sum of \$560. Judgment was asked for that amount.

A demurrer was interposed to the complaint, which was as follows:

"Defendants demur to the complaint of the plaintiff herein on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that the purported agreement alleged in said complaint is oral, whereas it is prescribed by the laws of the state of Washington that the same should be in writing."

The demurrer was overruled, and an answer interposed, which set up the same defense as was interposed by the demurrer. Certain denials were made, but there is no error based on the findings of the court. Judgment was entered in favor of the plaintiff for the amount prayed for; and from such judgment this appeal is taken, and raises the one question, viz, Does the statute of frauds, which provides that an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission shall be void unless in writing, apply to an agreement between two real estate brokers whereby one promises to pay to the other a fixed compensation for the sale of land, where the promisor has not himself received any compensation, and has no binding contract whereby he can make the owner pay a commission or compensation?

It seems to us that this question has been put at rest in this jurisdiction by the decision in *Jones v. Kehoe*, 61 Wash. 422, 112 Pac. 497. It was said by the court, in its expressed opinion in that case:

"From an examination of this statute, we are of the opinion that the law applies only to contracts between the owner of the land and the agent who sells or agrees to sell the

same, and that it does not apply between two brokers or real estate men.”

Notwithstanding the very able and earnest argument of learned counsel for appellants in this case, we think he has not successfully distinguished that case from the case at bar. It is true the circumstances of the case are somewhat different, but the principle decided was exactly the same, and the construction of the statute made in that case applies with equal force to the case at bar. The case of *Jones v. Kehoe*, *supra*, was approved by this court in *Orr v. Perky Investment Co.*, 65 Wash. 281, 118 Pac. 19; where, noticing the same contention that is made by the appellants in this case, viz., that the agreement for commission was void not being in writing, it was said:

“This was unnecessary. In *Jones v. Kehoe*, 61 Wash. 422, 112 Pac. 497, this court held that Rem. & Bal. Code, § 5289, which provides that an agreement employing an agent or broker to sell real estate for a commission shall be void unless in writing, applies only to contracts between the owner of the land to be sold and the agent he employs to make the sale, and that an oral contract between two brokers to divide the commission is valid.”

Being satisfied with the rule announced in those cases, the judgment will be affirmed.

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Opinion Per MORRIS, J.

[No. 10029. Department Two. January 26, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. E. W. KULBE
*et al., Appellants.*¹

INDICTMENT AND INFORMATION — INDORSEMENT OF NAMES OF WITNESSES—NECESSITY—STATUTES—CONSTRUCTION. The accused is not a "witness" within Rem. & Bal. Code, §§ 2043 and 2099, requiring the names of witnesses examined before the grand jury to be indorsed on the indictment, where the accused, learning of the investigation, was permitted to make a voluntary statement before the grand jury, but the indictment was not based thereon, and no vote was taken after the statement was made.

FALSE PRETENSES—ELEMENTS OF OFFENSE—EFFICIENT INDUCEMENT —INSTRUCTIONS—CONSISTENCY. In a prosecution for obtaining money by false pretenses, it is not inconsistent or misleading to instruct that the false representations must have been the effective cause inducing the loss of the money and that it is sufficient if they were relied upon and in some measure induced the loss; since the false representations need not be the sole, if the efficient, inducement.

Appeal from a judgment of the superior court for King county, Main, J., entered September 23, 1911, upon a trial and conviction of grand larceny. Affirmed.

Earl A. McVicar and *Charles A. Riddle*, for appellants.

John F. Murphy, *Hugh M. Caldwell*, and *H. B. Butler*, for respondent.

MORRIS, J.—The grand jury of King county found an indictment against appellants, charging them with the crime of grand larceny in obtaining money under "false and fraudulent pretenses and representations." Having been convicted, they appeal.

Two assignments of error are urged. Under the first assignment, error is predicated upon the court's refusal to quash the indictment. This motion is based upon the ground that the appellants appeared as witnesses before the grand

¹Reported in 120 Pac. 510.

jury, and their names were not endorsed upon the indictment. Rem. & Bal. Code, § 2043, provides that:

“When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon before it is presented to the court.”

Section 2099 contains a provision that a motion to set aside the indictment must be sustained, “when the names of all the witnesses examined before the grand jury are not endorsed thereon.” It will be admitted that the language employed in these two sections would seem to make it mandatory that the names of witnesses appearing before the grand jury should be endorsed upon the indictment. The purpose of this requirement is, first, to inform the defendant who his accusers are; and, second, to inform the prosecuting attorney who his witnesses are, to the end that there may be a fair and impartial inquiry into all the facts surrounding the commission of the offense charged. In so holding, in *People v. Freeland*, 6 Cal. 96, the court adds:

“It will not, I apprehend, be contended that the courts should extend the rule further than necessary to secure a fair trial, and the result of such a trial should not be defeated upon a mere legal quibble, where no injustice or injury is shown to have occurred.”

The facts upon this point, in so far as they are disclosed to us, are these: The indictment was based upon the testimony of the witnesses whose names were endorsed thereon. The appellants, learning of the investigation by the grand jury, sought an opportunity to appear and make a statement in their own behalf. They were permitted to do so, being advised that what they said might be used against them. The indictment was not based upon any fact disclosed by them in making their voluntary statement, and no vote was taken by the grand jury after they had so testified. It does not appear to us that, under these facts, the appellants were witnesses, within the meaning of the statute. The endorse-

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ment of their names would be of no aid to them in preparing themselves for trial, nor in ascertaining the facts upon which the prosecution relied for a conviction. It might, we think, be safely assumed that, in making their statements before the grand jury, they testified to no facts which would aid in finding a true bill against them. Their purpose in giving their testimony was rather to prevent an indictment from being returned, and to convince the grand jury of their innocence rather than their guilt. The endorsement of their names would have given no information to them, nor apprised them of any fact not wholly within their knowledge. Hence the endorsement of their names would serve no purpose within the object of the statute, nor disclose to them any witness who could be compelled by law to testify against them. The identical question here submitted has been passed upon adversely to appellants' contention in a number of cases, upon reasoning analogous to that we have adopted under statutes almost identical with ours. *People v. King*, 28 Cal. 266; *People v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; *People v. Page*, 116 Cal. 386, 48 Pac. 326. Appellants' first assignment of error is therefore overruled. To give effect to it would be to juggle with technical quibbles of the law, not contributing in any way to the conviction of appellants, nor depriving them of their guaranteed right of a fair and impartial trial.

The second error complained of is in the giving of the following instruction

"It is not sufficient that there be merely a false representation, but the prosecuting witness must have relied upon it. In other words, the false representation must have been the effective cause in inducing the prosecuting witness to part with her money. Therefore, if the prosecuting witness had knowledge of the truth, or did not believe the representations, or believing it, yet parted with the money on some other inducement, or if the prosecuting witness investigated for herself and parted with the money, relying entirely on the results of her own independent investigation, no crime has been

committed, even though the representation was false, if, as a matter of fact, it were false. Neither can the defendant be convicted if the representation were made after the money was obtained. On the other hand, I instruct you that the law does not require that a false representation should have been the sole means, or the principal means of inducing the defrauded person, if any, to part with the money, but it is sufficient if such representation was believed and relied upon by such person and in some measure operated to induce her to part with her property."

The contention is that the instruction is confusing and contradictory in telling the jury in the first instance, that "the false representations must have been the effective cause in inducing the prosecuting witness to part with her money;" and later on, in saying, "it is sufficient if such representation was believed and relied upon by such person and in some measure operated to induce her to part with her property." We find no inconsistency in these statements of the law. It is unquestioned that a false representation, to be actionable, must be the effective cause inducing the complainant to part with his money or property. It does not necessarily follow that it must be the sole cause. If it be an effectual cause, it may operate with other moving causes of inducement, so long as the jury believe that the representation complained of had such an influence over the mind of the person defrauded that he would not have acted except for his reliance upon it. This, in effect, is the language of the instruction in saying that the representation must be relied upon "and in some measure operated to induce her to part with her money." If it operated upon her mind in "some measure," and induced her to act in reliance upon its truth, and because thereof she parted with her money, it was an effective cause of her act, and no error can be predicated upon thus instructing the jury. *State v. Knowlton*, 11 Wash. 512, 39 Pac. 966, and cases there cited; *Wax v. State*, 43 Neb. 18, 61 N. W. 117; *State v. Carter*, 112 Iowa 15, 83 N. W. 715; *State v. Dexter*, 115 Iowa 678, 87 N. W. 417; *State v. Merry*,

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(N. D.), 127 N. W. 83; *Braxton v. State*, 117 Ga. 703, 45 S. E. 64.

The instruction is sustained, and the judgment affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and ELLIS, JJ., concur.

[No. 9615. Department Two. January 27, 1912.]

HARRIET STAHL, *Respondent*, v. LULU SCHWARTZ, *Executrix etc., Appellant*.¹

VENUE—CHANGE—BIAS OF JUDGE—SUFFICIENCY OF SHOWING. The fact that a judge on a former trial had decided issues in favor of one party and had been active in promoting a settlement between the parties, does not show bias or prejudice entitling a party to a change of venue on the second trial.

APPEAL—REVIEW—HARMLESS ERROR. Error in denying a change of venue is not prejudicial, where on trial *de novo*, the judgment must be sustained in any event.

CONTRACTS — CONSIDERATION — SUFFICIENCY — MISCONCEPTION OF WILL. Where a will gave plaintiff, during widowhood, one-half of the income of an estate, amounting to several hundred dollars a month, and made specific legacies to certain minors to be paid at majority out of the whole estate, without interest, there is no consideration for a contract between plaintiff and the executrix whereby the plaintiff was to receive but one hundred dollars a month out of the income, the balance to accumulate as a fund out of which to pay the legacies, the principal of the estate being ample to pay them, and her legacy not being subordinate; since the contract is neither a benefit to the plaintiff, nor a detriment to the executrix.

SAME. The contract could not be considered an advantage to the plaintiff from the fact that, if she lived to her full expectation of life, and did not remarry, she would in the end receive a greater income from the estate by providing the accumulations with which to pay the legacies of the minors; it being a violation of public policy to enforce a condition of widowhood.

WILLS—CONSTRUCTION—LEGACIES—INCOME — PAYMENT. Under a will making specific legacies to minors to be paid at the age of majority, and giving one-half of the income to plaintiff "during widowhood," hers is a specific legacy, not subordinate to those of

¹Reported in 120 Pac. 856.

the minors, and entitles her to the full income until the minors are paid, and then on the reduced estate until she remarries; and it is immaterial that a direction is made that none of the real estate shall be sold until five years after the testator's death, since that only postpones fulfillment in case of deficiency of personal assets.

EQUITY—RELIEF FROM MISTAKE—MISCONSTRUCTION OF WILL—MISTAKE OF LAW OR FACT. Equity will grant relief from a mistake as a mistake of fact, where parties erroneously construe a will as requiring legacies to be paid out of the income, and contract with reference to such erroneous construction; the test involving mutual mistake of fact being whether the contract would have been entered into had there been no mistake.

ESTOPPEL—IN PAIS—PREJUDICE TO RIGHTS OF OTHER PARTY. Acceptance of money due plaintiff under a will, pursuant to a contract made under a misconstruction of the will and mutual mistake of fact, will not estop her from recovering the balance due on a proper construction of the will, where no injury results to the remainder of the estate, and the contract in no way limited or interfered with the right and duty of the executrix to manage the estate.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 13, 1911, upon findings in favor of the plaintiff, in an action to set aside a contract and for an accounting. Affirmed.

Dunphy, Evans & Garrecht, for appellant.

Rader & Barker, for respondent.

CHADWICK, J.—Catherine Stahl died, testate, on April 16, 1908, leaving an estate which was appraised at \$102,825. Her will provided:

“(1) I direct the payment of all my just debts out of my estate.

“(2) To each of my grandchildren, Magdalene Louise, Ernest William and Henrietta, children of my deceased son, Henry Stahl, I give and bequeath ten thousand dollars, the said sum without interest to be paid to each of my said grandchildren on the arrival of each at the age of majority. . . .

“(3) I will and direct that none of my real estate be sold for five years after my death.

“(4) I give, devise and bequeath unto my daughter, Lulu Schwartz, one-half of the remainder of my property of

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whatsoever character and wheresoever situated, of which I may die seized, to be hers absolutely.

"(5) In the other half of all my property of whatsoever character and wheresoever situated, of which I may die seized, I will, bequeath and devise a life estate to my son, Frank H. Stahl. After determination of said life estate, I will, devise and bequeath the remainder of said one-half of all my estate to any child or children of my said son Frank H. Stahl, born to him in lawful wedlock after the date of this will, but should there be no such child or children born to him in lawful wedlock after the date of this will, or the issue of such child or children, I then give, devise and bequeath said remaining one-half of my estate as follows: One-half thereof to the children of my deceased son, Henry H. Stahl in equal shares and one-half thereof to the children of my daughter, Lulu Schwartz in equal shares, subject, however, to a trust to pay the income thereof to the surviving widow of my said son, Frank H. Stahl, during her widowhood, but should she remarry she is thereupon to be paid out of the trust estate, five thousand dollars and all the interest of said widow in said estate is thereupon to cease and be determined.

"(6) The contingent provisions herein are not to be construed as either hindering the segregation of my estate or as preventing the same remaining intact after the year of administration . . . and I give unto my said executors full power to manage and control and in any way use and deal with any and all property of my estate during its administration without any application to any court for leave or confirmation. I do also empower my said executors to continue any business conducted by me or dispose of the same on such terms as they may see fit. In making investments or reinvestments or in conducting or continuing any business said executors are expressly authorized and empowered to proceed and act as they may deem wise and prudent; all without leave or approval of any court and without liability or responsibility for the consequences of their acts or for losses incurred as a result thereof."

Her son Frank H. Stahl died October 28, 1909, leaving plaintiff, Harriet Stahl, his widow. Just after the death of Frank H. Stahl, defendant Lulu Schwartz, who had the active management of the estate prior to the death of Frank H.

Stahl, took up with plaintiff the matter of the future management and disposition of the estate, and proceeding upon the theory that the specific legacies provided in the will were payable out of the income rather than the body of the estate, an agreement was entered into, the material parts of which follow:

“Witnesseth: That whereas Catherine Stahl died leaving her last will and testament, bearing date January 30th, 1907, heretofore duly admitted to probate in the superior court of the state of Washington, for Walla Walla county, as the last will and testament of decedent, reference to which is hereto made, and

“Whereas, her surviving son, Frank H. Stahl, has recently died, leaving surviving him said second party as his widow, and

“Whereas, the will of decedent provides that each of her grandchildren, Magdalene Louise, Ernest William and Jennietta, children of her deceased son, Henry Stahl, shall each be paid at the age of majority the sum of \$10,000 without interest, and

“Whereas, each of the parties hereto are mutually desirous of creating a fund out of the rents, issues and profits of the estate of decedent to be applied towards the payment to each of said grandchildren, their respective bequests of \$10,000 each, on the arrival of each of them at the age of majority.

“Now, therefore, in consideration of the premises and the mutual benefits to be derived therefrom between each of the parties hereto, and the sum of one dollar this day in hand paid each to the other, said parties hereto mutually covenant and agree as follows, to wit:

“That each party hereto shall be paid out of the income of the estate of decedent on or before the 15th day of each and every month hereafter, the sum of \$100, until the aforesaid named grandchildren shall have been paid at their majority the sum of \$10,000 each under the terms and in the manner provided therefor in the last will and testament of decedent.

“That after each and every of said grandchildren have been fully paid their respective bequests aforesaid and as provided for in said will of decedent, each party hereto shall be

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paid out of the income of the estate of decedent on or before the 15th day of each and every month thereafter, the sum of \$100, and on or before the 15th day of January, of each and every succeeding year after the payment of the aforesaid bequests to the aforesaid named grandchildren, each party hereto shall be entitled to an equal undivided one-half of the residue of the net income received from the estate of decedent, less however the sum of \$1,000 to be kept on hand to be used for operating expenses incident to the care and maintenance of the estate of decedent. . . .

"That any debts owing by decedent or any debts or expenses incurred in the administration and settlement of the estate of decedent, shall also be deducted from any income therefrom.

"That should said second party remarry, then she is to be paid thereafter the sum of \$5,000, and no more, as her full interest in the estate of decedent as is provided for under the terms of said last will and testament of decedent, reference to which said last will and testament is hereto made for more particularity, and upon any such remarriage by her this agreement shall terminate."

The parties acted upon this agreement until August 4, 1910, when plaintiff brought this suit, praying that the contract be set aside, that an accounting be had, and that she be paid such proportion of the estate as she is entitled to under the will. Plaintiff alleges that she was induced to enter into the contract by the art and intrigue of the defendant Lulu Schwartz, who, by representations which were false and fraudulent, led her to believe that one-half of the net income of the estate would amount to but little, if any, more than \$100 per month; that plaintiff was not entitled to anything until after the legacies had been paid, and that haste was necessary in order to defeat the possible claim of a child alleged to be the daughter of Frank H. Stahl; that, at the time she signed the agreement, she had never seen the will, and relied wholly upon the representations of defendant, who was alleged to be a woman of large experience in business and of unusual shrewdness in handling property. It is further alleged that, as soon as plaintiff ascertained her legal rights,

she began this action. A trial was had after issue joined upon the material allegations of the complaint, and the trial judge was of opinion that the contract best served the interests of all parties, and should be allowed to stand as a definition of the rights of plaintiff and defendant and of their future relation to the estate. Thereafter, the court, being further informed, and conceiving that he had erred in his construction of the will, granted a motion for a new trial.

At this point we meet the first assignment of error. Defendant filed a motion for a change of venue; or if that could not be had, that another judge be called to try the case. This motion, supported by an affidavit alleging the bias and partisanship of the judge, was denied, and the case proceeded to trial. The real meat of the affidavit of prejudice lies in this: that, after a full hearing at the former trial, the court found that there had been no overreaching or fraudulent representations, that Mrs. Schwartz had acted in good faith, and that the contract was made with sufficient understanding to sustain it; and further:

"I will say frankly, I see no ground which might justify me in setting aside the contract, and I think it will be better for all parties that they go on under the contract and endeavor to so manage the estate as to pay these legacies, and leave something to be divided between the parties after it is done."

It is also alleged that the judge was overactive in an endeavor to promote a settlement between the parties. In all this we find no warrant for holding that there was a sufficient, or any, showing of bias or prejudice. Upon motion, the trial court has a right to set aside any decree or judgment if in his opinion justice has not been done (*Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175), and his doing so should not operate as an indictment of bias, prejudice, or interest.

We shall not review the cases offered as sustaining either the motion or the conduct of the court. Nor shall we discuss the suggestion that, whereas the legislature had just passed

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a law (Laws 1911, p. 611) which had not then become effective, but which nevertheless indicated the policy of the legislature to compel a change of judges, a refusal to abide by it indicates a partisanship which would warrant us in holding the refusal of the court to be an abuse of discretion. As we view the case, it being before us to be decided *de novo*, the error, if we found it to be such, would not be prejudicial. Furthermore, if appellant's construction of the law be adopted, it would result in a reinstatement of the original judgment. If the respondent's contentions are sustained, the contract could not be upheld in any event. So that we may, and we do, hold that defendant was actuated by no improper motives, and did not wilfully or intentionally mislead plaintiff, but that both parties were proceeding in good faith to protect their mutual interests, but under a misconception of the true facts, and hence in ignorance of the rights of the plaintiff.

Therefore, rejecting all of the argument and authorities offered to sustain the judgment of the court on the ground of fraud and undue influence, and coming to the will itself, we are undivided in the opinion that there was and is no consideration which the law would regard as either good or valuable to sustain the contract. It is fundamental that a consideration must be of some benefit to the promisor, or work some detriment to the promisee. When measured by this test, the contract not only did not work a benefit to plaintiff, but actually operated to deprive her of a most substantial present interest in the estate; and likewise, instead of operating to the detriment of the promisee, it worked a great advantage to her, for by paying the legacies out of the income instead of the estate, plaintiff would be paying, without any return or compensation whatever, one-half of the legacies which should be charged to the body of the estate, and therefore against the share of the defendant or her children.

We cannot subscribe to appellant's interpretation of the will, which is that the income to which plaintiff is entitled is

to come out of the one-half of the estate after all debts and prior bequests have been discharged. The subject of debts may be dismissed, for the will of a person could not operate to defeat them, and consideration of them is not now material. But the will does not postpone the right of the plaintiff to share the income until after the legacies are paid, and we cannot. The will is that the legacies be paid upon the attainment of full age by the legatees. No attempt is made to provide a fund out of which they are to be satisfied, or to make them subordinate to the legacies due plaintiff, which by reason of the death of her husband is as certain and as lawfully due as those payable to the grandchildren.

Considerable importance is attached to the third clause of the will, it being suggested that, in order to execute it, it became necessary to reserve a part of the income in order to meet the payment of certain legacies which would be payable before the five-year term had expired, and that this is enough to sustain the contract. It may be that, if there be no personal property, those to whom specific legacies have been given—the grandchildren—might have to wait five years or until the real property could be sold. (See section six of the will.) But section three in no way diminishes the right of plaintiff, for she is entitled to the income on one-half of the property, not from some future date or upon any contingency, but “during her widowhood.” To give effect to these words, we must hold that her right attached when she became a widow, and must continue until she remarries; in which event she too might have to wait the five-year term before she could demand the \$5,000, which is then provided in lieu of the income. It seems plain to us that plaintiff is entitled to the income, not after the legacies are paid, as contended by the defendant, but *until* they are paid, and thereafter upon the one-half of the estate as thereby reduced. The will seems to have been drawn with a dominant thought; that is, to give the estate, after remembering the grandchildren, to defendant and to Frank H. Stahl, each one-half. His

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death being foreseen, provision was made for the "widow," the plaintiff. If the testatrix had seen fit to reserve and limit her bounty, she might have done so. She did not, and we cannot; for the province of a court of equity is to carry out the will if its terms are certain, and not to substitute its will, although it might regard it as more advantageous to the remainder of the estate.

But it is said that equity will not relieve a party where a contract is entered into under a mistake of law. This may be granted, although there are some cases to the contrary. But this rule, when applied, is attended with certain restrictions and qualifications which are as well established as the rule itself. The contracting parties must have a true understanding of the facts. If so, then a mistake of law, or rather, of the legal consequences of their act, will not be relieved. But if facts be not understood, the rule does not apply. In this case, the parties mistook the fact. They put a wrong construction upon the will. Upon proper issue joined, the construction of a will is a question of law for the court; but when a false construction is put upon it by interested parties and they contract with reference thereto, it is a mistake of fact and not of law. The truest test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake. *Kowalke v. Milwaukee Elec. R. & Light Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. 877. Applying this test, it seems certain that plaintiff would not have surrendered an income of five or six hundred dollars a month, unless she and defendant had proceeded on the misconception of fact that it was necessary to retain the income to pay the legacies. The distinction between a mistake as to the legal effect of a contract and a mistake as to the subject-matter of the contract must be kept in mind.

"Contracts are daily made upon the assumption of certain facts, and the parties give their assent, not absolutely, but upon the implied condition that the reality conforms to the

assumption. If it should prove otherwise the condition is broken and equity relieves from the apparent agreement because there is no real assent." 20 Am. & Eng. Ency. Law (2d ed.), 812.

In the pursuit of this subject we have examined many cases, but found none which states the controlling principle more clearly than that of *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. Bell, a widower with one child, a resident of Ohio, agreed in writing to sell certain real property in this state. Our community property laws, of which he was wholly ignorant, intervened so that he could not carry out his contract. Morgan had solicited the contract, as defendant had in this case. Action was brought for specific performance and general damages. The maxim *ignorantia legis neminem excusat*, "a mistake of law," was relied on by Morgan, and that doctrine applied by the trial judge. After stating the rule and the exception which we have noted, Judge Dunbar, who wrote the opinion, said:

"The material question here is, does this case fall within the rule or the exception? And in the outset, in discussing this interesting question, to avoid the discussion of unnecessary propositions, it is well to keep in mind a well defined distinction between ignorance of an antecedent existing right which is to be affected by the agreement, and the legal import of the agreement itself. Thus in this case, if Bell's defense was that he did not know the legal effect of the agreement which he entered into, in the absence of fraud or inequitable conduct on the part of plaintiffs, it would not be a defense to the action; but this is not the defense which he offers, but it is, that he was mistaken about his right to enter into such a contract. 'Mistakes, therefore,' says Mr. Pomeroy, 'of a person with respect to his own personal private rights and liabilities may properly be regarded, as in great measure they are, and may be dealt with as mistakes of facts. Courts have constantly felt and acted upon this view, though not always avowedly.' But there is nothing in the proposition announced by Judge Story, as cited by respondent, that conflicts with this proposition. Many instances are there given where the courts refuse to relieve from a mistake of law, but

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they are all cases where the party was asking relief from the consequences flowing from a misunderstanding of the legal effect of the contract. Indeed, Judge Story, in § 130 of his work on Equity Jurisprudence, endorses the same distinction: 'Sec. 130. There may be a solid ground for a distinction between cases where the party acts or agrees in ignorance of any title in him, or upon a supposition of a clear title in another, and cases where there is a doubt or controversy or litigation between parties as to their respective rights. In the former cases (as has been already suggested), the party seems to labor in some sort under a mistake of fact as well as of law. He supposes, as a matter of fact, that he has no title, and that the other party has title to the property.' The principle in the case at bar is the same, though the facts are reversed. Bell supposed, as a matter of fact, that he had the title; he did not intend to convey land which he did not possess, but proceeded upon the supposition that it was his to convey. It was not a mistake in calculation as to the legal consequences of his agreement, but purely and simply a mistake of an existing antecedent right affecting his title."

See, also, *Sanford v. Hartford Ins. Co.*, 11 Wash. 653, 40 Pac. 609. Space will not permit further quotation from these authorities or a review of others, but reference to them will disclose a thorough appreciation of the rule governing this case.

Coming back to the question of consideration, defendant has sought to show by the testimony of a public accountant the condition of the estate, and its probable income, gross and net, for a term of years; and it is contended that, whereas plaintiff was about twenty-nine years of age when the contract was made, her life expectancy was 36.73 years; that if she abides her contract and allows the legacies to be paid out of the income she would, at the end of her expectancy, receive \$173,618.79, as against \$169,118.79 under the will. It is said the contract is to the advantage of plaintiff. This argument is specious but not sound. It does not take into account the present right of plaintiff under the will, or the very decided element of human nature. That plaintiff might not be willing to remain a widow was foreseen by the

testatrix, and provision was made accordingly; and for this or any other court to put a condition of widowhood upon her in order to secure for her two or three thousand dollars at the age of sixty—to bind her to a life of celibacy for the money that there is in it—would be an unwarranted usurpation and a violation of sound public policy. Plaintiff is young. It may be that she will see fit to remarry, in which event she may take the \$5,000 which would then be due her.

Defendant has invoked the doctrine of estoppel. It is said that plaintiff has accepted the amount due her under the contract for a long time without objection; that defendant has paid \$10,000 to one of the legatees, and has not turned property into money that might have been converted upon a better market than now exists. We find in these facts nothing which would warrant us in applying this doctrine. Plaintiff was entitled to receive all that she received out of the income, and more. The payment of the legacies was provided in the will, and the contract in no way interferes with or limits the right and duty of appellant to manage the estate for its best interests. If she did not turn the property into money when it might have been disposed of, it cannot be charged either to the contract or to the fault of respondent; and although it may be admitted that defendant has done some things which she might not have done, and omitted to do some things which she would have done but for the contract, the subject-matter of this controversy is not in law the property of the defendant, but of the estate of Catherine Stahl; and so long as the effect of our judgment is to execute the will of Catherine Stahl, and no injury results to the remainder which can be charged to the contract or the conduct of plaintiff, there can be no estoppel.

Finding no error, the judgment of the lower court is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

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Syllabus.

[No. 9987. *En Banc*. January 27, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Edward E. Webster, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Respondents*.¹

PROHIBITION—TO COURTS—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL. The remedy by appeal is inadequate, and prohibition lies to prohibit the superior court from enjoining compliance with an order of the public service commission, where the relator is subject to the penalties for disobedience to the orders of court, on the one hand, and of the order of the commission, if lawfully made, on the other, and in a position of extreme uncertainty.

CONSTITUTIONAL LAW—POLICE POWER—AUTHORITY TO FIX TELEPHONE RATES. It is within the police powers of the state to regulate telegraph and telephone rates by surrendering the control to a properly constituted commission, subject to judicial review, under art. 12 of the Const., providing for the organization of corporations and declaring telegraph and telephone companies to be common carriers subject to legislative control.

MUNICIPAL CORPORATIONS—APPLICATION OF GENERAL LAWS—CONSTITUTIONAL LAW—LEGISLATIVE POWERS—DELEGATION TO MUNICIPAL CORPORATIONS—RESTRICTIONS—SPECIAL CHARTERS—TELEPHONE COMPANIES—FRANCHISE—RATES—CONTROL. Const., art. 11, § 10, authorizing the adoption of charters by cities of the first class, which provides that the same shall be "subject to and controlled by general laws," and Id., § 11, which authorizes a city to make police regulations not in conflict with general laws, are to be construed as a reservation of a general legislative power in the state; so that a franchise granted by a city to a telegraph company under authority of a special city charter is subject to such reservation, and may be controlled or modified by subsequent acts of the legislature.

STATUTES—GENERAL LAWS—CONSTRUCTION. The public utilities act of 1911, p. 538, providing for a public service commission with power to establish reasonable rates and charges for public service corporations, is a "general law," within Const., art. 11, § 10, authorizing the adoption of special charters by cities subject to general laws; Const., art. 12, § 18, having required the legislature to establish reasonable maximum rates for railroads and other common carriers, and providing that a railroad commission may be established and its powers defined.

¹Reported in 120 Pac. 861.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — MUNICIPAL FRANCHISES — POWER OF STATE TO ABROGATE — POLICE POWER — TELEGRAPHS AND TELEPHONES — RATES. The power to fix rates being reserved by the constitution, the same is not an incident to the right of a city to frame a special charter; and there being no express grant or waiver of the constitutional reservation, a city franchise to a telephone company granted under authority of a special charter is a mere license or permission, subject to control by the police power of the state, and the obligations thereof are not binding upon the state as a contract within the meaning of the Federal constitution.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — FRANCHISES — ABROGATION — PARTIES ENTITLED TO QUESTION — MUNICIPAL CORPORATIONS — TELEPHONE AND TELEGRAPHS — RATES. Where a city, in granting a franchise to a telephone company fixing maximum rates, reserved the right to alter, amend or annul the conditions of the franchise, it cannot raise the objection that the state, in raising the rates in the exercise of its police power, will impair the obligations of the contract.

TELEPHONE AND TELEGRAPH COMPANIES — SERVICE — RATES — POWER TO INCREASE — PUBLIC UTILITIES COMMISSION. Under the public utilities act of 1911, p. 538, authorizing the public service commission to fix reasonable rates and charges for public service corporations which are required to furnish adequate and sufficient services and facilities, the commission has power to require a telephone company to raise its rates above the maximum permitted by its city franchise, where such increased rate has become necessary to provide sufficient revenue to give an adequate service.

MORRIS and ELLIS, JJ., dissent.

Application filed in the supreme court November 2, 1911, for a writ of prohibition to the superior court of King county, Dykeman, J., prohibiting further proceedings in an action to enjoin compliance with an order of the public service commission respecting telephone rates. Writ granted.

Geo. D. Emery (Preston & Thorgrimson, of counsel), for relator.

James E. Bradford and Howard D. Hughes, for respondents.

The Attorney General and Stephen V. Carey, Assistant, amici curiae.

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CHADWICK, J.—The Independent Telephone Company was organized in 1901, under the laws of the state of Washington. Under its general powers, and by the warrant of a franchise, it is operating a telephone system, in the city of Seattle, which has grown in volume from 3,774 service telephones in 1903, to 18,071 in 1910. In June, 1910, a patron of the company made complaint to the then state railroad commission, alleging inefficient service on the part of the company, the charge of inefficiency being predicated upon an allegation that relator's rates were insufficient to support a proper service. A hearing was had, and after a physical valuation of the company's property, an order was made directing the company to inaugurate a new schedule of rates which were somewhat higher than those fixed in the franchise theretofore granted by the city of Seattle. The order of the commission became effective November 1, 1911, and was upon that day and the day thereafter put in force by the company. On the evening of the second day, the company was enjoined, at the instance of the city of Seattle, from collecting the rates fixed by the commission which, because of the act of 1911, will be hereafter referred to as the public service commission. Thereupon relator came to this court and asked that a writ be made to run against the superior court, prohibiting it from further proceeding in defiance of the order of the public service commission.

The attorney general has filed a brief in this court, and has made oral argument in support of the contention of the relator that the state, through its public service commission, had ample and lawful power to raise the service rates of the company above the rates fixed in the ordinance granting its franchise. A part of the relator's brief is taken up with a discussion of the question of the jurisdiction of this court. Inasmuch as relator is now in a position of extreme uncertainty, being subject to the penalties of the superior court for disobedience of its orders, on the one hand, and to a severe penalty for disobedience of the order of the commission,

if lawfully made, we think this question may be disposed of by saying, without discussion, that a remedy by appeal would be inadequate. We have, therefore, merely suggested enough to indicate that we are of opinion that we have jurisdiction under the law. Otherwise the stipulation of the parties would be ineffectual to give it to us. The city by demurrer admits that the franchise rates are inadequate; and in the interests of a speedy decision upon the main issues, it is stipulated that the sole questions to be determined by us are: (1) "Has the legislature vested in the public service commission authority to increase the rates specified in § 7 of Ordinance, No. 6,498 of the city of Seattle and ordinances amendatory thereof, under which the company is operating," and (2) "If such power has been vested in the public service commission, whether the legislative acts assuming to grant such powers are unconstitutional and void."

Of the first proposition there can be no doubt. The police power of the state is more than an attribute of sovereignty. It, like the power of taxation, is an essential element of government, and exists in every state without express declaration and without limitation, in so far as it is made to apply to the health, peace, comfort, and morals of the people. Formerly applied strictly and directly, it has now, because of changed economic conditions, come to be more favored, and is frequently relied upon to sustain laws which but indirectly affect the common good. The most modern and perhaps the most striking application of this power is to be found in our own books (*State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101), where this court said:

"The test of a police regulation when measured by this clause of the constitution [§ 3, art. 1,] is reasonableness, as contradistinguished from arbitrary or capricious action. . . . There is no absolute right to do as one wills, pursue any calling one desires, or contract as one chooses . . . liberty means absence of arbitrary restraint, not immunity

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from reasonable regulations and prohibitions imposed in the interests of the community."

It is unnecessary to dwell upon that case or the authorities upon which it is made to rest. "In its broadest acceptance it means the general power of the state to preserve and promote the public welfare, even at the expense of private rights." *Tacoma v. Boutelle*, 61 Wash. 434, 112 Pac. 661. The power to regulate and control the rates of common carriers has been held to be a legitimate exercise of the police power of the state. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265; *Munn v. Illinois*, 94 U. S. 113; *Chicago etc. R. v. Iowa*, 94 U. S. 155.

The authority of the public service commission was, by the legislature of 1911, extended so as to include within its reach all public service corporations. Laws 1911, p. 538, § 1.

It is a settled principle of constitutional law that,

"The government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." *M'Culloch v. Maryland*, 4 Wheat. 316, 409.

See, also, *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

Under art. 12 of our state constitution, there can be no doubt of the power of the state to take cognizance of all matters affecting common carriers. Telegraph and telephone companies are made common carriers and subject to legislative control. The surrender of this control to a properly constituted commission, subject to judicial review, has been sustained as a lawful exercise of the legislative authority. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179. In *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100

Pac. 184, the right to fix rates for common carriers was sustained.

The only question remaining is the all-important one of whether the rates fixed by the ordinance granting the franchise may be altered or annulled by the state under its reserved powers; or, to be more exact, its police power. Much has been said in argument as to the power of the city; whether it had any power to fix rates in the absence of controlling legislation; or whether, granting its power, it holds it by express grant; or whether it is implied. Under the great weight of judicial authority, it seems to be certain that a municipality exercising the delegated power of the state has no right to fix rates unless the power be express.

"It has been settled by this court that the state may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 508. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. *Providence Bank v. Billings*, 4 Pet. 514, 561; *Railroad Commission Cases*, 116 U. S. 307, 325; *Vicksburg &c. Railroad Co. v. Dennis*, 116 U. S. 665; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 599, 611; *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S. 201, 211; *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1.", *Home Telephone Co. v. Los Angeles*, *supra*.

See, also, *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465; *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 129 N. W. 925; *Jones, Tel. & Tel. Companies*, § 19; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 10 S. W. 197, 9 Am. St. 370, 2 L. R. A. 278; *Chicago Gas-Light & Coke*

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Co. v. People's Gas-Light & Coke Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; *Bluefield Waterworks & Imp. Co. v. Bluefield* (W. Va.), 70 S. E. 772, 33 L. R. A. (N. S.) 759, and note.

But, as we view this case, we may assume that the city of Seattle had lawful authority, when it passed an ordinance granting a franchise to the company, to fix its tolls.

Section 10, art. 11, of our state constitution, has played an important part in our jurisprudence. The phrase "subject to general laws," has been held to be a reservation of a general legislative power in the state, and under it many laws have been passed and many decisions pronounced holding that it was the policy of the state constitution that freeholders' charters and amendments thereto shall always be subject to the control of general laws. *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *Benton v. Seattle Elec. Co.*, 50 Wash. 156, 96 Pac. 1033. To the same effect are: *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064; *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674; *Tacoma Gas & Elec. Light Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655; *State ex rel. Navin v. Weir*, 26 Wash. 501, 67 Pac. 226.

This rule has become so firmly entrenched in our jurisprudence that it was held in *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259, that a general law, authorizing cities to grant franchises to street railroads and to prescribe the terms and provisions thereof, superseded the charter provision of the city of Seattle requiring franchises to be sold at public auction to the highest bidder. In that case the court said:

"While our constitution has reserved to the people of cities of the class to which Seattle belongs the power to frame and adopt charters for their own government, it also provides that such charters 'shall be subject to and controlled by general laws.' And this court has repeatedly and uniformly held that where the legislature has enacted laws re-

lating to such cities, or to the powers and duties of their officers, such laws supersede charter provisions in conflict therewith. . . . It having become the settled law of this state, by the construction repeatedly placed upon the constitution, that a general law enacted by the legislature is superior to and supersedes all freehold charter provisions inconsistent therewith, it becomes plain that, when the legislature, by the Laws of 1903 and 1907, gave to the legislative authority of the cities of the state the power to grant street railway franchises, and also the power to '*prescribe the terms and conditions on which such railways . . . shall be constructed, maintained and operated,*' that power cannot be limited or prescribed by freehold charter provisions."

It may be said that the public utilities act is not a general law, within the constitutional meaning of that term; that no law can be a general law unless it actually fixes a uniform rate. If it were not for § 18, art. 12, of the state constitution:

"The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established, and its powers and duties fully defined by law;"

and § 1, art. 12:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law;"

and the construction put upon § 18 in *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184, it might be so held. In the *Great Northern* case, it was contended that the only power the legislature had was to pass a law fixing a maximum rate. But this court held,

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as all other courts have come to hold, that the power to fix rates does not necessarily compel the legislature to make, by a general law, a just rate which is uniform. This contention was expressly overruled in that case. Rates cannot be arbitrarily fixed, but must be determined with reference to the conditions existing where they are to be put into execution. Manifestly a legislature could not, by special acts, fix these rates. The only practical method was—and it seems to have been foreseen by the makers of the constitution—to create a commission with power to ascertain what rate would be just and reasonable in each particular case, and to prescribe and enforce the same. *Interstate Commerce Commission v. Chicago etc. R. Co.*, 218 U. S. 88; *Interstate Commerce Commission v. Chicago etc. R. Co.*, 218 U. S. 113. The power thus exercised by the commission is not a usurpation of legislative and judicial functions, nor does it unite in one body conflicting governmental authority. It consists simply in the ascertainment of facts upon which the general rule of the legislative body, and of the constitution prescribing that reasonable rates shall be adopted, operates. *Railroad Commission Cases*, 116 U. S. 307; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362.

It having been heretofore held that the constitutional power can be exercised through a commission with power to fix rates, and that the public is not bound to pass a general law fixing maximum rates, it follows that the public utilities act is a “general law,” and under many decisions of this court, supersedes any ordinance or charter provision of any city which may conflict therewith. The power to fix rates is a mere detail in the execution of the general law, and cannot be insisted upon as the essential letter of the law. *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184; *Field v. Clark*, 143 U. S. 649; *Buttfield v. Stranahan*, 192 U. S. 470; *Union Bridge Co. v. United States*, 204 U. S. 364.

It may seem that, when applied to particular instances,

the law putting power to fix a schedule of rates in a legislative board infringes some supposed right that might well have been exempted from its operation. But that consideration is for the legislature and not for the courts. We have no power to negative the will of the legislature because we do not like a law. Within the limits of its constitutional warrant, the legislature is supreme; cities and towns are the creatures of, and subordinate to, its will; and for us to hold the public utilities act obnoxious to the constitution, or as offensive to our own notions of governmental policy, would make this court the law-making body, in defiance of the will of the people to enact their own laws in legislative assemblies duly convened. The people, not only of this state, but generally in other states, have gone beyond the original conceptions of local self-government; and to sustain and make practical needed reforms, have had to fall back upon the police power of the state as declared by laws general in their application. This rule in many states is the result of judicial construction, but our people left no room for construction. Section 11, art. 11, state constitution, is a positive declaration.

“Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.”

This section is subject to the same interpretation as § 10, and under it a general law becomes controlling. The words “not in conflict with general laws,” as there employed, do not mean that municipal regulations passed in the absence of general laws foreclose the right of the state to assert its sovereignty, but merely that the police power may be exercised until such time as the state acts. They must then give way to the general law. If, by its inaction, the state has permitted a municipality to assume and exercise its police power, it is not foreclosed of its right, if the legislature afterwards sees fit to exercise it. Cooley, Const. Lim. (7th ed.), p. 279. Under this rule, concurrent jurisdiction

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over crimes has been sustained. But where the state, as has this state, asserted its jurisdiction over a given subject-matter, and there is no room for concurrence, the municipal charter or ordinance must give way. Dillon, Mun. Corp. (5th ed.), 631.

The same question now confronting us was before the supreme court of Wisconsin. A city had granted permission to a railway company to run interurban cars over and along its streets. One of the conditions upon which the right was given was that the fare to be charged between the two cities should not exceed ten cents for a single trip during the life of the franchise, which was thirty-five years. The franchise was accepted and acted upon. Thereafter the company to which the franchise had been assigned announced that the rate would be increased to fifteen cents. The city brought suit to prevent the increase in fares, and to compel the company to abide by its contract. The company set up as defenses that the city had no power to exact the condition; that the ordinance, in so far as it related to interurban fares, was *ultra vires*; that the ordinance had been superseded and repealed by subsequent legislative action; that a fare of ten cents was not compensatory, and that one of fifteen cents was reasonable. The trial court found that a ten-cent fare was not compensatory, and that a fifteen-cent fare was reasonable, but that the company was bound by the terms of the ordinance, and enjoined it from raising the rate. The supreme court reduced the questions involved to three: (1) Did the parties have the power to make a contract? (2) if so, to what extent is it binding and enforceable? (3) had it been lawfully superseded or nullified? And now, adopting the language of the court:

“(1) That the traction company had the right on its part to make a contract fixing the rate of charge for a given service, provided such contract violated no law and was not inimical to public policy, is clear enough. By so doing it could not forestall the state and prevent it from exercising its governmental function regulating rates. But until the

state sees fit to interpose, the carrier ordinarily may exercise a free hand in fixing rates, subject to the qualification that they must not be unreasonably high and must not be unjustly discriminatory. . . . There was no law inhibiting the making of the contract involved, at the time it was entered into, and there is nothing to show that it was discriminatory or against public policy. . . . We therefore hold that the parties were competent to make the contract entered into."

(2) It was held that no special authority had been conferred on the city to enter into the contract and,

"The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation."

(3) A public service law enacted in 1905, somewhat similar to our own, was next considered by the court.

"By that statute (sec. 3) it is provided that all charges made by any carrier coming under its provisions 'shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.' Railway companies are required to file their tariffs with the railroad commission and are prohibited from making changes therein except on ten days' notice, and the rates fixed in such tariffs are declared to be the lawful rates until changed as provided by the act. Sec. 12 of the law provides that the commission may, on complaint or on its own motion, proceed to determine the reasonableness of any rate, and, whenever such rate is found to be unreasonable, may fix and determine what a reasonable charge shall be, and thereupon the rate so fixed shall be the lawful rate. By subd. 'c' of sec. 12 a railway company is given the same right to make complaint that is given to any other person or corporation. It is contended that this law had superseded the contract involved in this suit and that therefore the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply provided that all rates should be reasonable, and left to the railroad commission the power to determine the fact as to whether

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or not a given rate was reasonable. When that determination was reached the law became operative upon the particular rate called in question and the rate arrived at then became the lawful rate and continued so until set aside in the manner provided by the law. The railroad commission has made no determination in the case before us; at least, if it has, it is no part of the record. Until that determination is made the contract is in force. When it is made the contract is superseded, if the rate is changed. The commission has ample authority to proceed upon its own motion. The traction company, under subd. 'c' of sec. 12, has power to make the necessary complaint to compel an investigation. This works no hardship on any one. It may be, as the trial court found, that a ten-cent fare is unreasonable and that a fifteen-cent fare is not so. Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be that adequate service cannot be given at the rate fixed or that conditions have so changed that the road cannot be operated unless rates are increased and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident contract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it." *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 129 N. W. 925.

The same principles are affirmed in *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, and *Dawson v. Dawson Tel. Co.* (Ga.), 72 S. E. 508. Notwithstanding it is earnestly contended on behalf of the city that the contract is inviolable, and cannot be abrogated under the contract clause of the Federal constitution. Counsel relies mainly upon the case of *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, and its kindred cases: *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1; *Walla Walla Water Co. v.*

Walla Walla, 60 Fed. 957; *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529; *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368; *State ex rel. Dennison v. Seattle R. & S. R. Co.*, 64 Wash. 167, 116 Pac. 638; *State ex rel. Linhoff v. Seattle, Renton & Southern Co.*, 62 Wash. 124, 113 Pac. 260; *City of Noblesville v. Noblesville Gas & Imp. Co.*, 157 Ind. 162, 60 N. E. 1032; *People v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Selectmen of Clinton v. Worcester R. Co.*, 199 Mass. 279, 85 N. E. 507; *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33; *City of Detroit v. Ft. Wayne & B. I. R. Co.*, 95 Mich. 456, 54 N. W. 958, 35 Am. St. 580, 20 L. R. A. 79; *Omaha Water Co. v. Omaha*, 147 Fed. 1.

Our answer to this contention is that each of these cases is based upon one of two premises; either, as said in the *Cleveland* case, the authority conferred upon the city was "express and unmistakable;" or the controversy was between the city and its franchisee, the state being in no sense a party and having no interest in the result of the litigation. Where the state is a party, and it appears that there has been no express grant or waiver of its constitutional right to fix rates so as to give an ordinance the force of a contract binding upon the state (granting that under our constitution this could be done), it cannot be held, as a matter of either law or policy, that a franchise such as the one now under consideration is a contract binding upon the state of Washington; and for several reasons.

The power to fix rates, being a right reserved by the people of the state, cannot, in the light of the constitution, be held to be an incident to the right to frame a freeholders charter. *State ex rel. Garner v. Missouri & K. Tel. Co.*, 189 Mo. 83, 88 S. W. 41. Such contracts, when entered into without express legislative authority, are permissive only, and subject to the exercise of the sovereign power of the state, and do not partake of the quality of contracts as that term is employed in the contract clause of the Federal

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constitution. Instances of a contract valid between parties, but held to be abrogated by the subsequent exercise of the police power of the state were treated in *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, and in *Chicago, I. & L. R. Co. v. United States*, 219 U. S. 486 (the free pass decisions). In the *Mottley* case it was contended that:

“Congress has vast power. It is a potent arm of the government, but it is not omnipotent. When a private citizen has made a lawful contract, has executed that contract fully so far as his obligation is concerned, and has parted with his money or property on the faith of the inviolability of his contract, that contract cannot be confiscated, simply because Congress has power to regulate commerce between the states.”

Justice Harlan, speaking for the whole court, met this contention, saying:

“The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the constitution never intended any such state of things to exist.”

He then quoted from jurists and textwriters as follows:

“That no contract can be carried into effect, which was originally made contrary to the provisions of the law, or which being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt.” Lord Ellenborough, *Atkinson v. Ritchie*, 10 East. 530.

“If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and

tenable." Judge Cooley, *Kentucky etc. Bridge Co. v. Louisville & N. R. Co.*, 34 Am. & Eng. R. Cases, 630.

"If one agrees to do a thing which it is lawful for him to do, and it becomes unlawful by an act of the legislature, the act avoids the promise." Parsons, *Contracts* (6th ed), 675.

Judge Harlan, continuing, says:

"We forbear any further citation of authorities. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the constitution, of its power to regulate commerce. No power of Congress can be thus restricted. The mischiefs that would result from a different interpretation of the constitution will be readily perceived."

If originally the power of the state of Washington to fix and control rates and tolls for common carriers was more doubtful than the power of Congress to legislate upon the subject-matter of interstate commerce, upon which we rely to sustain our argument, that doubt was entirely removed by the railroad cases decided by this court and to which we have referred. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179; *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184.

"The same conclusion is reached in respect to the legislative control over contracts which a corporation may make with individuals. Such contracts are ever subject to the future exercise of the police power, in the promotion of the public welfare. This is particularly true in the case of *quasi* public corporations, such as railroads." Tiedeman, *State & Federal Control*, p. 961.

See, also, *Chicago etc. R. Co. v. Nebraska*, 170 U. S. 57; Jones, *Tel. & Tel. Companies*, § 214; *Portland R. Light &*

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Power Co. v. Railroad Commission, 56 Ore. 468, 105 Pac. 709, 109 Pac. 273; *Southern Wire Co. v. St. Louis Bridge etc. Co.*, 38 Mo. App. 191.

"The granting of a franchise to a telephone company by an ordinance passed by the municipal authorities of a city, wherein it is provided that the company 'agrees and binds itself by this ordinance that the rates charged shall be \$1.50 per month for residence phones and \$2.50 per month for business phones,' and an acceptance of such franchise by the company, does not prevent the telephone company from increasing such charges, if permission to do so is subsequently granted it by the railroad commission, especially as it appears that the city was not specifically authorized by its charter, or other legislative enactment, to fix the charges to be made by telephone companies. . . . The order of the railroad commission does not violate the provisions of the state and Federal constitutions prohibiting the impairment of the obligations of contracts." *Dawson v. Dawson Tel. Co.* (Ga.), 72 S. E. 508.

"No government can advance in civilization, in wealth, and in influence without an enforcement of these [police] powers. When any corporation acquires a franchise for the purpose of carrying on a corporate business within a state, it is accepted subject to the police power. By giving the franchise (we may say, permitting it to be exercised) the state did not abrogate its power over the public highways; nor in any way curtail its power to be exercised for the general welfare of the people; . . . Neither can this power be alienated, surrendered, nor abridged by the legislature by any grant, contract, or delegation whatsoever; because it constitutes the exercise of a governmental function without which it would become powerless to do those things which it was specially designed to accomplish." *Jones, Telegraph & Telephone Companies*, § 214.

"No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not

be affected or controlled by subsequent legislation? Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature. . . . Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature." *Chicago, B. & Q. R. Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 71.

The supreme court of Oklahoma has held, in *South McAlester-Eufaula Tel. Co. v. State ex rel. Baker-Reidt Merc. Co.*, 25 Okl. 524, 106 Pac. 962, that municipal corporations in that state have no power to fix rates, and that a grant of a franchise conferred no rights save the mere naked permission of the town to the defendants to enter upon the streets and alleys and erect their poles and wires. While this ruling was made upon the statutes and ordinances there in force, the principle applies in this case; for the court found that, where a contract was made in contravention of the power of the state to act over a given subject-matter, an essential element of a contract was wanting; that there was

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nothing conferred upon the company or reserved by the municipality that the law would regard as a consideration, either valuable or good. Or, as we have said elsewhere in this opinion, the sovereign power of the state cannot be made the subject of a contract so as to defeat the declared right of the people of the whole state to reserve that power to themselves and to put its execution in the hand of the particular agency designated by them in their written constitution.

The power to fix rates, if exercised by a city, unless that power is clearly expressed by legislative grant, is in the nature of a license, and is revocable at the will of the legislature when, in its judgment, the common good demands its reassertion. The state does not act by contract, but by grant, license, or reservation. It is not usually bound by the contracts of others when exercising its police power. So jealous is it of the sovereignty of its police power that, in the case of the *Home Tel. Co. v. Los Angeles*, the supreme court of the United States held that a grant by the legislature of the state of the right "to fix and determine charges for telephone, telephone service, and connections," did not carry with it the right to *agree* upon rates. In other words, as that court and others have universally held, the delegation of power must be "clear and unmistakable." In dealing with the sovereign power of the people, nothing can be left to inference. The court accordingly said that the power to fix and determine rates being within the police power, the city might *establish* rates, but that it could not, under the delegation quoted, *contract* so as to bind itself or the other party as against the exercise of the police power. In principle its holding could not have been otherwise, for the strength of the police power lies in the fact that it is not a subject of contract; that it cannot be bartered or bargained away.

Reduced to its lowest terms, the contention of the city is, not that it exercised a delegated power, but that it acted at a time when there was no prohibition on the part of the state;

and that this being so, the city acted as an *imperium in imperio*, with power to determine the rates to be charged and the time for the contract to run; and that having so acted, vested rights of contract and property have attached to the franchise, which the legislature could not thereafter bar or abrogate. These contentions would be meritorious if applied to contracts involving merely private interests, but can have no application where the interests of the state are involved. A similar argument was made in the case of *Chicago etc. R. Co. v. Iowa*, 94 U. S. 155, where it was held, in response to the contention that a subsequent act of the legislature regulating freight rates impaired the obligations of contract between the state and the company, as well as the contracts of the company with its stockholders, bondholders, and mortgagees.

“It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people. In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good. Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied

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upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the state, and continued subject to the same governmental powers that existed before."

Without exception, courts have, in the absence of positive limitation, upheld the authority of the state as against municipal corporations when dealing with the problems of public service, and have been careful to warn against the danger of admitting a divided authority either to contract or control.

In the recent case of *Troy v. United Traction Co.*, 202 N. Y. 333, 95 N. E. 759, it is said:

"The public service commission was established, among other things, for the purpose of promoting uniformity and consistency in authoritative directions to be given to public service corporations and to constitute a tribunal trained to consider and determine controversies and problems relating to such corporations and to direct and supervise their relations to and dealings with the public as their patrons. A construction of the Public Service Commissions Law that would permit any municipality to disregard and set at naught the orders of the public service commission in cases like the one now before us would not only cause confusion of authority but would make of no effect some of the work of the commission for the doing of which it was established."

There is another reason for the issuance of the writ which suggests itself to us as of possible worth, and that is, whether the city can raise the question of impairment of its contract. The city, it would seem, is in no position to assert this principle, for the state is doing only what it (the city) reserved the right to do—to alter, amend, or annul the conditions of the franchise; that is, it is exercising the police power, but whether the power be wholly in the state or held to be concurrent, as is generally held in the matter of nuisances and minor crimes, the city should not be heard to raise the question, and the other party to the contract does not.

We might multiply authorities to sustain these proposi-

tions, but it would unnecessarily extend the limit of this opinion, for as said by Justice Harlan, they are all one way. But it would seem that in principle we could not do otherwise than sustain the powers of the public service commission as they have been defined by the legislature. Laws of this character mark the practical solution of those problems which have beset the people since private interest, operating not locally but generally throughout the state or nation, have become the almoners of public necessities in so far as these necessities touch public service—transportation, light, power, and kindred subjects. Rich fields of investment have been opened up. Watered stock and stock dividends have concealed the true amount of the investment as well as what would be a fair return upon the actual capital employed, from those who were not called upon merely, but forced, to bear the burden of sustenance.

“Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.” *Munn v. Illinois*, 94 U. S. 113.

In its search for remedies and while seriously considering municipal, state, or government ownership, the public, by reference to the police power of the state, has almost unwittingly—unwittingly in the sense that it is not generally appreciated—solved the problem, and has, by the application of fundamental as well as established relative propositions of law, gained every advantage of ownership without assuming its burdens. From the time it was held to be within the police power of the state to control public service corporations to the extent of fixing rates, the natural sequences of that holding have followed with a rapidity which may seem, to

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those who have been wedded to the theory that the government could not interfere in the use, or limit the earnings, of property devoted to public service and which was not put to an unlawful use, to be alarming. With the power to fix rates established, the process of elimination of unjust rates became a mere matter of detail, based upon mathematical calculation, the only question giving any ground for debate being the basis of calculation. Primarily, as well as logically, the basis for fixing rates for the use of property devoted to a public use is its real value; not its value as returned by those who own or control it, but a fair value fixed by the agents of the state; and, after due allowance for depreciation and upkeep as well as legitimate cost of operation, a rate that will afford a fair interest return on the investment.

Bearing in mind the interest of the public in public service corporations—an interest born of necessity—the justice and sound reasoning of these premises will not be gainsaid or denied. But from the statement of every proposition there must follow in logic its corollary. If we assume the right to lower rates to make the return conform to a fair interest rate upon a fair valuation, it follows that we must, in conscience, yield the right to those affected to petition for a rate, though it be higher than a present one, that will accomplish the purpose of the law. These principles have their foundations laid deep in the doctrine of common honesty between man and man—between the public and its servants. They are sustained upon the theory that the public is willing to pay a full return and no more, a fair return and no less, to those who have lent their capital for its benefit. Such laws, being honest in their purpose and honestly applied, are within the meaning of the term “general law,” as used in our constitution; for the great aim and object of the law is to balance the scales of justice between all who seek its light and protection. Nor does it follow that, because there may be instances when those to whom the law has intrusted the respon-

sibility of finding the facts ordain or decree that a rate for service be raised, the common good is not served. It may work hardship to the few, but the working of the general law will in the end surely promote the good of the many. Under these statutes, efficiency has been, and will continue to be maintained. While rivalry may be promoted, monopoly in the sense of oppression is made impossible. The benefit of ownership is enjoyed, while its dangers—not the least of which is the political activities of great armies of public employees—are no longer a menace to those who, to avoid the hazards of public ownership, have unwillingly subscribed to the conditions prevailing before this and other states entered upon the policy of public control. To hold that the public service commission is without jurisdiction to raise rates to the point of fairness, as it finds that point to be, would deprive the commission of the right to lower rates. To dissent from these views would be to hold that the state could not relieve the people of a municipality of an improvident contract, or one entered into in defiance of the will of the people, instances of which might be easily multiplied were we called upon to do so.

It should be understood that we are not passing upon the fairness of the new rate. Its fairness is admitted by counsel for the city. We are dealing only with the power of the state to control those properties which exist by its authority, and the attending question whether these powers may, by inaction, be so surrendered as to estop the state from subsequently asserting them.

For the reasons assigned, it is ordered that the writ issue.

DUNBAR, C. J., FULLERTON, PARKER, GOSE, MOUNT, and CROW, JJ., concur.

MORRIS, J. (dissenting)—Not being able to concur in the views of the majority, I dissent; and as the question is an important one and its principles, if adhered to, determinative of rights of cities of the first class contrary to my conception

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of the correct interpretation of our constitution, I desire in a general way to express my reasons for such dissent.

I cannot read § 10, art. 11, of the constitution, permitting cities of the first class to frame a charter for their own government, consistent with and subject to the constitution and laws of the state, without reaching the conclusion that it was the intention of the framers of the constitution to invest cities of the first class with the fullest powers of local self-government, intending that within itself the city should be supreme; the only limitation being that the power it sought to exercise should be "consistent with and subject to the constitution and laws of this state." The only reasonable and sensible construction of this limitation, in view of the power sought to be conferred, is that, while the state was yielding to the city the power to exercise local self-government in all matters purely municipal in their character, the city must recognize the constitution as the supreme authority of the state and pass no law under its power of local self-government which would exempt its citizens from obedience to the general laws of the state. In other words, the state said to the city: "So long as you confine yourselves to matters purely municipal in their nature, you may frame your own government. In all other matters, in common with all citizens of the state, you must yield to the constitution and general laws." The state, in exercising its power of general legislation for the benefit of all its citizens, reserved the power to control and govern the citizen within the city as it did the citizen without the city, to the effect that, in the exercise of its general power of government over the citizens, its laws should be uniform. The franchise under which the telephone company exercises its right within the city of Seattle was obtained from the city. Its right to be a corporation and exercise certain powers included within its charter or its franchise "to be" it derived from the state, but the right to exercise those granted powers within the city of Seattle in the manner and to the extent it sought to exercise them it

obtained from the city under its franchise "to do." The franchise from the state and the powers therein conferred were not self-executing within cities of the first class. The legal exercise of those powers could be obtained, and obtained only, from the city under proper municipal franchise and regulation, and unless there is in that franchise some grant of power or regulation inconsistent with or in conflict with the constitution and laws of this state, the state must recognize it as a valid franchise and give effect to all its provisions.

I concede that the state cannot divest itself of its police power, and that once having delegated that power, it may again assume it and exercise it through legislative enactments. But this concession does not establish the right of the public utilities commission to exercise powers granted by the constitution to cities. Under this concession, if the city should pass an ordinance in the exercise of its police power and the state should subsequently enact a law upon the same subject, the ordinance must yield to the extent of the conflict. But this is not the situation confronting us. Under its constitutional authority, the city has granted a franchise fixing rates to be charged for telephones, there is no provision of the constitution and no general law in conflict therewith. Subsequently the state created a commission to whom it delegated certain powers. In the exercise of these powers, this commission invalidates the franchise granted by the city; for if it can change that franchise in one particular, it may change it in all particulars, and thus eventually usurp every function of municipal government. I cannot consent that this may be done, nor can I yield to the announcement of any principle which holds that a commission created by and deriving its powers from the legislature can control and exercise higher powers than a city, created by and deriving its powers from the constitution. To so hold is to hold that the legislature is the supreme power of the state. I had always understood that the constitution was the supreme power of the state, to which the legislative and all other departments

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of the state government must yield. The rule of the majority, if carried to its logical conclusion, means at any time the legislature may so determine, it can establish a commission, exercising every function of municipal government, and deprive all cities of this state of their constitutional birth-right; a situation so abhorrent to my mind that I cannot permit its announcement without an expression of dissent.

The purpose of this constitutional provision was undoubtedly the conception that the cities could best rule themselves because they best knew their own needs and the best method to fully supply those needs so as to measure up to the greatest good of its citizens. As now written, the legislators from the rural sections of the state, without experience in the vexing and complicated problems of municipal government, may, because they are in the majority in the legislature, change the whole conception and plan of municipal government as formulated out of the experience of the dweller in the city. This to my mind was the very evil the constitution sought to guard against. If the rule of the majority be the law, our constitution-created municipalities have now no greater power, and stand in no different light, from like municipalities in those states where cities are created by special or general laws, subject at all times to legislative control, notwithstanding the expression of such a strong constitutional intent to place them upon a higher plane. And this is to be done, not by the legislature itself under the guise of some general or special law, but under a delegation of power to a subordinate commission. If the legislature may do this in one phase of constitutional authority, it may do it in another, and thus the legislature becomes in all respects, as by this decision it does in municipal matters, the constitution of the state. Surely it was intended by the language of our constitution relative to cities of the first class that they should stand upon a different plane from those of a lower class, organized and controlled by general law. Yet if this decision be the law, I should like to have the distinction

pointed out and the plane bounded, as I can see no distinction between the city of the first class exercising its powers under express constitutional authority, and the cities of the second, third, and fourth classes, created by general law, if all alike are to be subject in all things to legislative control. In the cases from this state, cited by the majority in support of their position, some general statutory provision has been found conflicting with the ordinance or charter provision there under discussion. As is said in *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259, the last expression of this court, relied upon by the majority:

“This court has repeatedly and uniformly held that where the legislature has enacted laws relating to such cities, or to the powers and duties of their officers, such laws supersede charter provisions in conflict therewith.”

I can readily admit at the outset of this dissent, that the charter or ordinances must yield to the general law; but as I view it, there is here no general law on the same subject that conflicts with this franchise. All there is, and all that can be claimed there is, is an attempt on the part of the legislature to create a subordinate branch of the state government, invested with a power to inquire into the reasonableness of the rates of public service corporations. If the legislature should pass a law fixing a maximum and minimum rate, then the cases cited by the majority would be in point. It has, however, not attempted to do so. Nowhere in the law can there be found any expression in conflict with what the city of Seattle has done under its grant of franchise to this telephone company; and until such a law can be found, I must protest against any subordinate branch of the state government exercising powers within cities of the first class that by the constitution have been conferred on the cities themselves. To magnify an order of the public service commission into a law of the state within the meaning of this constitutional phrase is, to my mind, beyond the power of

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courts or legislatures. The constitution cannot thus be amended nor its express provisions abrogated.

Much is said in the main opinion that full control of public service corporations is within the police power of the state, and that the surrender of this control to a properly constituted commission, subject to a judicial review, is a lawful exercise of legislative authority. As an abstract legal proposition, that may be readily admitted; but as is said by Peckham, J., in *People v. Gillson*, 109 N. Y. 389, 400, 17 N. E. 843, 4 Am. St. 465, the police power is not above the constitution, but is bounded by its provisions, and when any right or franchise is expressly protected by any constitutional provision, it cannot be destroyed nor its validity impaired by the legislature under any valid exercise of the police power. To my mind, this is the fundamental principle here involved.

For these reasons, I dissent.

ELLIS, J., concurs with MORRIS, J.

[No. 9817. Department One. January 29, 1912.]

SUSAN O. SHULTICE, *Respondent*, v. MODERN WOODMEN OF AMERICA, *Appellant*.¹

BENEFICIAL ASSOCIATIONS—AGENTS—CLERK OF LOCAL CAMP—BY-LAWS. The clerk of a local camp of a fraternal beneficial society is the agent of the society, and his knowledge is its knowledge, notwithstanding by-laws to the contrary effect, where he was the officer who collects, receipts for, and transmits the assessments, and the society had no other fund from which to pay death losses and no other means of collecting the assessments.

BENEFICIAL ASSOCIATIONS—FORFEITURE OF MEMBERSHIP—NONPAYMENT OF DUES—BY-LAWS—WAIVER—POWERS OF LOCAL AGENT. Notwithstanding by-laws of a fraternal beneficial society limiting the right of delinquent members to reinstatement to those in good health, and providing that no local camp or officer can waive the by-laws, the society is liable on a death loss, where, after knowledge of suspen-

¹Reported in 120 Pac. 531.

sion, it accepted and retained his monthly assessments, collected and transmitted by the local clerk with knowledge that the member had become insane; such notice of bad health to the local clerk being notice to the society whether communicated or not.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered February 20, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a life insurance certificate. Affirmed.

Davis & Rhodes (Benjamin D. Smith, of counsel), for appellant.

Samuel T. Crane and H. M. Stephens, for respondent.

Gose, J.—The plaintiff brought this suit to recover upon a beneficiary certificate, issued by the defendant upon the life of her husband. There was a verdict and judgment in her favor, from which the defendant has appealed.

The appellant is a foreign corporation, organized and doing business as a fraternal beneficiary society. It has subordinate lodges called local camps, in this and other states in the Union. On the 6th day of October, 1899, it issued its benefit certificate in the sum of \$2,000 to Henry J. Shultice, payable to respondent upon the death of the insured. By the terms of the application, the by-laws of the appellant became a part of the contract of insurance. The by-laws provide that a beneficial member who shall fail to pay a benefit assessment on or before the last day of the month following the levy thereof "shall *ipso facto* become suspended, and during such suspension his benefit certificate shall be absolutely null and void." They further provide that any member so suspended may be reinstated within sixty days from the date of suspension, by a payment of all arrearages, including current assessments, etc., provided he be in good health at the time of the reinstatement; "provided, further, that the receipt and retention of such assessments or dues in case the suspended neighbor is not in good health or is engaged in any such prohibited occupation, shall not have the effect of rein-

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stating said member or entitling him or his beneficiaries to any rights under his benefit certificate." No method is provided for determining the health of a member seeking reinstatement. The by-laws also provide that no local camp, nor any of its officers, shall have the power to waive any by-law, and that the clerk of the local camp is the agent of that camp and not the agent of the society, and that no act or omission on his part shall create a liability against the appellant or waive any of its rights.

The insured became an inmate of the hospital for the insane, at Medical Lake, on August 12, 1908, and died at the hospital while an inmate thereof, on April 5, 1910. He was not in good health during that time. The respondent made timely payment of his assessments after he became an inmate of the hospital, until June, 1909. The assessments for June and July, 1909, were paid at her request by the local camp at Spokane on September 13, 1909. Thereafter all assessments were regularly paid, either by the respondent or the local camp, until the death of the deceased. The clerk of the local camp reported the suspension of the deceased to the appellant shortly after August 1, 1909, for the nonpayment of the June assessment. After September 13, 1909, he made regular remittances of the assessments to the appellant. On July 14, 1910, the appellant tendered to the respondent all assessments paid after the date of the suspension of the deceased. The respondent and her agent testified that, after the suspension and before the reinstatement of the deceased, they told the clerk of the local camp at Spokane that the deceased had been committed to the asylum. This was denied by the clerk. The court instructed the jury that, notwithstanding the provisions of the by-laws, the appellant is liable upon the certificate, if it, through its local agent, received and retained the assessments after the suspension, with knowledge that the deceased was not in good health; that the knowledge of the local agent having authority to receive and collect delinquent assessments was the knowledge of the ap-

pellant; that the appellant could waive the provisions of the by-laws with reference to the suspension of a delinquent member, and that it is liable to the respondent if it received and retained delinquent assessments with knowledge of the good or bad health of the deceased.

This instruction presents the principal question in the case. The appellant contends that the question of the agency of the clerk of the local camp is settled by the contract. On the other hand, the respondent contends that the question of agency is one of law to be determined from all the facts and circumstances in the case; in other words, to be determined from the actual, rather than the fictitious, relations of the parties. We think the instruction correctly states the law. The appellant, as we have seen, is a foreign corporation. It can only act through its local camps. The clerk of the local camp is the officer who collects, receipts for, and transmits the assessments. The appellant has no other fund from which to pay its death losses, and no other means of collecting assessments. A corporation can act only through its officers and agents. This court has consistently and steadfastly adhered to the view that it will not permit an insurance company, whether it be an old line company or a fraternal organization, to change the fundamental law of agency by contract, and thus exonerate itself from liability for the acts of those who are in fact and law its agents. *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Foster v. Pioneer Mut. Ins. Assn.*, 37 Wash. 288, 79 Pac. 798; *Hall v. Union Cent. Life Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 83 Am. St. 844, 51 L. R. A. 288; *Staats v. Pioneer Ins. Assn.*, 55 Wash. 51, 104 Pac. 185; *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Schuster v. Knights & Ladies of Security*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. 905.

The precise question was before the court in *Hart v. Ni-*

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agara Fire Ins. Co., *supra*, where the court, at page 624, said:

"If, under the legal, well established and universally understood definition of agency, the solicitor is in law and in fact the agent of the company, it should not be allowed to escape its responsibilities by a simple device of words which flatly contradict the true meaning of the contract."

In the *Staats* case, we said that, "A corporation can act only through its agents and they must be held to have such power as inheres in the duties they are assigned to perform." In the *Hoeland* case we said: "The appellant cannot change the fundamental law of agency by exacting a certificate from the insured, stating that his answers [to the medical examiners] are correctly written." In the *Schuster* case we said that the local secretary was the agent of the head society notwithstanding the by-law to the contrary. This view has the support of the following cases from other jurisdictions: *Pringle v. Modern Woodmen etc.*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231; *Supreme Lodge etc. v. Davis*, 26 Colo. 252, 58 Pac. 595; *Modern Woodmen etc. v. Lane*, 62 Neb. 89, 86 N. W. 943; *High Court etc. v. Schweitzer*, 171 Ill. 325, 49 N. E. 506; *Coverdale v. Royal Arcanum etc.*, 193 Ill. 91, 61 N. E. 915; *Alexander v. Grand Lodge etc.*, 119 Iowa 519, 93 N. W. 508; *Brotherhood of Painters v. Moore*, 36 Ind. App. 580; *Sovereign Camp etc. v. Carrington*, 41 Tex. Civ. App. 29, 90 S. W. 921; *Johanson v. Grand Lodge etc.*, 31 Utah 45, 86 Pac. 494; *Hoffman v. Supreme Council etc.*, 35 Fed. 252; *Court of Honor v. Dinger*, 221 Ill. 176, 77 N. E. 557; *McMahon v. Supreme Tent etc.*, 151 Mo. 522, 52 S. W. 384; *Supreme Lodge etc. v. Jones*, 35 Ind. App. 121, 69 N. E. 718.

The *McMahon* case thus states the rule:

"The laws of the order declare the subordinate tent and the officers thereof to be the agents of the member in his dealings with the supreme tent. But there is no merit in the proposition. The law will determine whose agent one is,

not from the mere declaration that he is the agent of the one or the other, but from the source of his appointment, and the nature of the duties he is appointed to perform."

In *Supreme Lodge etc. v. Jones, supra*, it is said:

"Notwithstanding the fact that it is declared by the laws of the order that the officer charged with receiving from the members and remitting assessments to the supreme lodge shall be the agent for the local lodge, yet it is firmly settled by the authorities that in that respect he will be regarded as the agent of the grand lodge."

It follows, we think, as a corollary, that the knowledge of the local agent will be conclusively held to be the knowledge of the appellant without regard to whether he communicated the facts to it. Any other view would destroy the benefit flowing from the fact of notice to the agent. *Mesterman v. Home Mut. Ins. Co., Hart v. Niagara Fire Ins. Co., Staats v. Pioneer Ins. Assn., Modern Woodmen v. Lane, and Supreme Lodge etc. v. Davis, supra.*

In discussing the question in the *Mesterman* case, we said:

"If, on the contrary, it was acting as the agent of the appellant, the knowledge which it had was in law the knowledge of the appellant, whether communicated to it or not."

In the *Lane* case the court said: "The knowledge of the local clerk was probably chargeable to the defendant." In the *Davis* case it is said:

"It will also be presumed that he has communicated all information to the order which he obtains in the discharge of his duties in making collections on its behalf which affects its rights; or, if he has not, still, the order having intrusted him with the particular business, the member paying his assessments to him has the right to deem his acts and knowledge those of the order; or, otherwise stated, the agent authorized by the association to accept money for its benefit must necessarily be charged with knowledge of all facts accompanying and affecting its acceptance."

The appellant, with knowledge of the suspension of the deceased, and with knowledge through its agent of the fact

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that the deceased was insane, accepted the assessments for the months of June, July, and August, in the month of September, and thereafter accepted and retained his monthly assessments to the date of his death. This clearly constituted a waiver of the by-laws limiting the right to reinstatement to those in good health. *Staats v. Pioneer Ins. Assn.*, *Hart v. Niagara Fire Ins. Co.*, and *Schuster v. Knights and Ladies of Security*, *supra*. In announcing this view we have not overlooked the provision in the by-law relating to the retention of assessments. Speaking to a like by-law in the *Schuster* case, we said:

"We are not unmindful of the language of the by-law quoted, but we are unwilling to stand sponsor for a principle of law which would uphold such a stipulation. The language seemingly has reference to the retention of assessments by local officers. But if it includes the retention by the respondent, the injustice of the provision is too glaring to receive judicial sanction."

It is argued that this view is opposed to the rule announced in *Sheridan v. Modern Woodmen etc.*, 44 Wash. 230, 87 Pac. 127, 120 Am. St. 987. In that case the suspension of the assured continued for more than two years prior to his death without any offer upon the part of any one to pay his dues or assessments.

We deem it proper to say that the appellant has cited cases from other jurisdictions which hold that a by-law which provides that the local secretary shall be deemed the agent of the local order, and not of the head order, will be given force. It has cited other cases which hold that, while the local officer is the agent of the head lodge notwithstanding the by-law to the contrary, his powers are limited by the by-laws, and that those holding beneficiary certificates are charged with notice of the limitation thus imposed upon his agency, and that notice to such agent of the bad health of the insured is not notice to the principal unless actually communicated to it. This court, however, as we have seen, has held from the beginning that it will determine both the ques-

tion of agency and the power of the agent from the actual, rather than the fictitious, relations of the parties. This, we think, is the more wholesome rule.

It is suggested that the court erred in sustaining objections to certain questions, propounded to respondent upon her cross-examination, touching the payment of certain assessments. There was no error in the ruling of the court, as the undisputed testimony shows that the June assessment was not paid until September. The appellant's testimony shows that the assessments were thereafter regularly paid. The other assignments do not require separate consideration.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9779. Department Two. January 29, 1912.]

THOMAS D. GAMBLE, *Administrator etc.*, Appellant, v.

THOMAS DAWSON *et al.*, Respondents.¹

DOMICILE — CHANGE — ABANDONMENT — INTENT — EVIDENCE — SUFFICIENCY. The evidence is insufficient to show abandonment of domicile in this state, established here for many years, where the deceased returned to his native state owing to ill health, and remained there 18 months until he died, but intending to return to this state if he recovered his health, as shown by his letters and the fact that he did not sell his home or furniture, and other circumstances, although he bought a small place in his native state.

HUSBAND AND WIFE — COMMUNITY PROPERTY — ADMINISTRATION — VENUE. The widow is entitled to have administration of community personal property in the county of the domicile of the deceased at the time of his death.

CORPORATIONS — STOCK — SITUS OF DOMESTIC STOCK IN POSSESSION OF NONRESIDENT — ACTIONS — VENUE — JURISDICTION. The claimant of corporate stock is entitled to bring an action to recover the same at the place where the company is incorporated, notwithstanding the certificates are in the possession of a nonresident.

¹Reported in 120 Pac. 1060.

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PROCESS—SUBSTITUTED SERVICE—NONRESIDENTS—ACTION AS TO CORPORATE STOCK. Substituted service outside the state upon a non-resident stockholder of a domestic corporation is constructive notice and gives the court jurisdiction of an action to determine the title to the stock, and issuance of an attachment is unnecessary; since the court has jurisdiction of the *res*, and the corporation is protected by the decree, Rem. & Bal. Code, § 3693, providing that no transfer of stock shall be valid until it is entered on the books of the company.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered December 27, 1910, upon findings in favor of the defendants, dismissing an action by an administrator to secure possession of corporate stock and personalty as property of the estate. Reversed.

John A. Peacock and F. E. Langford, for appellant.

R. E. Porterfield, John M. Gleeson, and Joseph F. Morton, for respondents.

DUNBAR, C. J.—This is an action in equity. Appellant is a duly appointed, qualified, and acting administrator of the estate of James Dawson, deceased, in the state of Washington, appointed by the superior court of Spokane county. The defendant Dawson is a resident of Maryland, and is the administrator of the estate of James Dawson, deceased, in the state of Maryland. From 1889 to the time of his death, the deceased, James Dawson, and his wife, Henrietta Dawson, from the time of their marriage in 1895, resided in Spokane county, until they went to the state of Maryland, where they resided about eighteen months, and until James Dawson died in January, 1909. Henrietta Dawson, his wife, then returned to Spokane county. It is the contention of the appellant that the residence of James Dawson and his wife was in Spokane county at the time of Dawson's death, and that their sojourn in Maryland was temporary and did not disturb their legal residence in Spokane county. This question will be discussed hereafter.

The other defendant, the International Coal & Coke Com-

pany, is a domestic corporation, with its place of business in Spokane county. James Dawson, at the time of his death, was the owner and holder of five thousand shares of stock in the International Coal & Coke Company, together with all the dividends accrued and to accrue thereon. This action by the administrator asks for a decree of the court that the five thousand shares of stock in the International Coal & Coke Company, together with all dividends accrued thereon, be decreed the community property of said James Dawson, deceased, and his widow, Henrietta Dawson, and as such be subject to the jurisdiction of the superior court of Spokane county, and subject to administration in this jurisdiction; that the defendant company be ordered and decreed to make no transfer of said five thousand shares except to appellant, and to transfer the same to the appellant upon his request so to do, and to pay appellant all dividends accruing thereon which it might have in its possession; directing the cancellation of said certificates representing said five thousand shares of stock, and that a new certificate issue to appellant for said shares. The complaint alleged that, a short time prior to the time Henrietta Dawson left Maryland, she placed in possession of defendant Thomas Dawson for safe keeping, among other things, the certificates for the five thousand shares of stock mentioned above, and that Dawson had refused to return said certificates of shares of stock to Henrietta Dawson or to this complaining administrator; that dividends have accrued on said five thousand shares in the hands of the defendant corporation, a demand for which dividends had been made by the plaintiff and had been refused; demands the possession of the five thousand shares of stock from the said Thomas Dawson, the cancellation of the certificates by the defendant company, and the issuance of another certificate as stated above. There are other allegations in the complaint concerning \$1,700 worth of personal property in the state of Maryland which was alleged to be in the possession of the defendant Thomas Dawson, and a demand was

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made for a return of the said property; but we will not notice that demand further, for the property was plainly within the jurisdiction of the courts of the state of Maryland, and not subject to the jurisdiction of this state.

The defendant Coal & Coke Company answered, in substance, that the shares of stock had been issued, as alleged in the complaint, to said James Dawson; that there had been dividends declared which the company was ready and willing to disburse and turn over to the proper claimant therefor; but that, inasmuch as there was more than one claimant, it refused to recognize either claimant until it was determined by the court who the proper claimant was. The defendant Dawson made a special appearance denying the jurisdiction of the court over his person, the service having been made personally upon him in the state of Maryland. The court overruling his plea to the jurisdiction, he answered, alleging, among other things, that all the property which was the subject-matter of this action was, at the time of the commencement of this action and ever since has been and now is, located in the state of Maryland outside of the state of Washington; that no writ of attachment, garnishment, order or process of any kind whatsoever has been issued out of this court, or at all, or levied upon any of the property mentioned in said complaint, whereby said property could or might be brought within or under the jurisdiction of the court; denied many of the allegations of the complaint; but alleged, that James Dawson died, intestate, in Montgomery county, in the state of Maryland; that he was a resident of said state and county and had his domicile therein at the time of his death, and left the personal and real property mentioned in the complaint; that on the 9th day of February, 1909, the defendant was appointed administrator of the estate of said James Dawson, duly qualified as such administrator, and letters of administration upon said estate were duly issued to him, and that he thereafter entered upon the discharge of his duties as such administrator, and

ever since has been and now is acting as such administrator under such appointment; that the said Henrietta Dawson, after his appointment, delivered into his hand as such administrator, acting in his official capacity and not otherwise, all the personal property mentioned in the complaint; that he proceeded to administer upon said estate; that he never had and does not now have or claim the possession of any of the property mentioned in said complaint in his own person, but only as the administrator of the estate of James Dawson, deceased.

On the subject of the right of Henrietta Dawson, the wife, to the shares of stock which are the subject of this action, Thomas Dawson answered that, prior to the marriage of the said James Dawson and Henrietta Dawson, he, together with Henry A. Dawson, was seized and possessed of a tract of land in Whitman county, Washington, that the same was owned equally between them, and for convenience of transfer was held in the name of the said James Dawson, and that subsequent to his marriage James Dawson sold said land and with the proceeds of the sale purchased the stock in the International Coal & Coke Company mentioned in this complaint, and the other personal and real property mentioned in the second cause of action in said complaint; and prays that the action may be dismissed as to him. Many other matters are set up in the complaint and in the defense of Thomas Dawson which we do not deem relevant to the discussion and determination of the issues involved. A large portion of the briefs of respective counsel, and the oral arguments presented by them, involve the discussion of the question of the special appearance of the defendant Dawson, and whether or not that special appearance was waived by the answer and motion made by defendant Dawson during the trial of the case. The court found certain facts, and from such findings of fact a judgment of dismissal was entered. From that judgment this appeal is taken.

We are at a loss to understand upon what theory the court

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dismissed the action as to the Coal & Coke Company, unless it was upon the theory that an action of this kind could only be brought in the jurisdiction which was the home of the holder of these shares of stock, and not in the jurisdiction which was the home of the corporation issuing the stock. The court found that James Dawson, at the time of his death, was a resident of the state of Maryland, and, in effect, that he had lost his residence in the state of Washington. In this finding the court erred. The record shows that Dawson, for some time prior to his leaving Spokane, had been in declining health. He was born and reared in Maryland and returned to that state, thinking that his health might thereby be restored; and it must be confessed that his idea was that, if it was not restored and he continued to decline in health, he would die in his old home in Maryland, and he preferred to die there rather than in Spokane. He stated to some of his friends when he went back to Maryland that he was like a chicken coming home to roost, and, in effect, that he had come home to die among his own friends and relatives. But this is not sufficient to lose to him his legal residence in this state. It is probably a common desire, when sickness overtakes one and death is anticipated, to return to one's native place, and to be surrounded at such a time by old friends and relatives and old scenes and associations. The longing to die in such environment we think is almost universal. And that is about the substance of this case. It is true that, when James Dawson went to Maryland, he fitted up a house on the old farm and moved into it, and when he was able, superintended the work of the farm, which he held in common with his brothers, and even went so far as to buy an acre or so of land adjoining the farm. But his wife testifies, and there is nothing in the record to contradict it, that he did this for the purpose of getting rid of some negroes who occupied a shack upon this small tract of land, as he did not desire to have them in so close proximity to him. It also appears that he furnished the old house and repaired it, spend-

ing a few hundred dollars for that purpose. But this does not necessarily indicate an intention to permanently live in a place. It is common for people when they go to health resorts, to the seashore or elsewhere, to rent and repair, or even construct, cottages and houses to live in; and it was natural that, being there with his wife, he should desire to be comfortable and have at his hand the conveniences of life while he did remain there, whether his health improved or whether the result should be his final dissolution.

It seems to us, from all the evidence in the case, that it was never his intention to abandon his residence in Spokane in case his health should improve. This is evidenced so strongly by a letter written to his old friend, F. E. Langford, that no other conclusion can be drawn than that he had hopes of returning, and intended to return if possible. After inquiring about some unfinished business which he had left in Spokane, the letter proceeds as follows:

“Wish I were back in Spokane. If ever I feel able to stand the confinement of the office again, I shall hike westward sure. So keep a warm place in your heart for me;” which shows conclusively that he was contemplating a return as soon as it was possible for him so to do. Another circumstance, while not controlling, is indicative. He did not dispose of his real property or of his home in Spokane, but rented the home, together with a portion of the furniture in the house during all the time of his sojourn in Maryland, and had not disposed of it, and there is no indication that he tried to dispose of it, up to the time of his death. Without specially reviewing all the testimony in the case, we are satisfied that he had not lost his residence in Spokane county, and that, when his wife returned to their old home, she had a right to have these shares of stock administered in that jurisdiction, even conceding that it was necessary for the residence of the community to be in Spokane at the time of the commencement of the action.

But as we view this case, the principal and controlling

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proposition is as to the situs of these certificates of stock; whether an action concerning them should be brought in the home of the holder of the certificates, or where they are located, or in the jurisdiction where the corporation which issued them is located. The rule is announced by 1 Cook on Corporations, § 12, as follows:

“Legal proceedings against the stock may be initiated at the domicile of the corporation. A claimant of stock in a corporation may institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, even though the holders of the stock are nonresidents and are brought into the case only by publication and substituted service. The court acquires jurisdiction over the defendants.”

Justice Story, in his Conflict of Laws, said that, “Questions relating to shares of stock are to be determined by the law of the state of the corporation.” This is a question relating to the shares of stock; it is a question relating to their ownership, to the dividends accruing, and to the manner of their administration in this particular case; and while shares of stock are personal property, they are none the less an indivisible interest in the corporation. If the property of the corporation is land, then the owner of the shares of stock has an interest in the land of the corporation. If the corporation is dealing in cattle and horses, the owner of the shares of stock has an interest in the value of the horses and cattle, with the management, of course, in the corporation. If it is dealing in mines, the owner of the stock has an interest in the ore which the corporation possesses, and it is an indivisible interest, an interest that reaches to the property of the corporation as a whole and does not reach to any segregated part. But the certificate is simply an evidence of the *pro rata* share, or *pro rata* interest, of the holder of the stock in the whole property of the corporation. Hence, it must appear that the corporation is the essential thing from which the shares issue, and to which the owners of the shares must look for a return on their investment. If this

be true, then constructive notice to a nonresident is sufficient to give jurisdiction, and the ancillary proceeding, such as an attachment, is not necessary in an action of this kind; for the property of the share owner or the holder of the shares, though he be a nonresident, is already within the jurisdiction of the court, and it is the property being within the jurisdiction of the court which is the essential aid to jurisdiction, rather than any particular mode or means by which the property is brought within the jurisdiction. The substituted service, such as was made upon the defendant in this case, thereby becomes a completed service, giving jurisdiction over his person, the *res* already being within the jurisdiction of the court. In this case it is not denied anywhere that the corporation was within the jurisdiction of the court. It is not denied by Dawson, and the corporation itself came into court, submitting itself to the jurisdiction, and asking that the court denominate a proper claimant to these shares. The same authority mentioned above, in § 363, says:

“It is a well established principle of law that shares of stock may, for certain purposes, have a *situs* at two separate places at the same time. For the purposes of suits concerning rights to its title, for taxation, and for a few other purposes, shares of stock follow the domicile of the stockholder. On the other hand, it has at the same time a *situs* where the corporation exists, and this *situs* may be for the purposes of suits concerning title to the stock, for attachment and execution, and for various other similar purposes.”

This rule was applied by the supreme court of the United States in *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, where it was held that an action could be brought for the purpose of taxing the shares of stock in the state of Michigan where the owners of the shares resided in another state, the court saying:

“The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the

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state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner."

This subject is reviewed in *In re Bronson's Estate*, an interesting case from New York, reported in 150 N. Y. 1, 44 N. E. 707, 55 Am. St. 632, 34 L. R. A. 238. That was an action brought to tax shares and bonds of a certain corporation in New York, and the court held that there was a distinction between the bonds of the company and the shares of stock; that the bonds, which were the property of a non-resident, could not be taxed, while the shares of stock could; that the bonds simply represented a debt of the corporation, while the shares of stock represented the personal property in the corporation itself, the court saying:

"The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds, towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfillment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprises. The corporation has the legal title to all the properties acquired and appurtenant, but it holds them for the pecuniary benefit of those persons who hold the capital stock. They appoint the persons to manage its affairs. They have the right to share in surplus earnings, and, after dissolution, they have the right to have the assets reduced to money and to have them regularly distributed. Each share represents a distinct interest in the whole of the corporate property;" citing *Jermain v. Lake Shore etc. R. Co.*, 91 N. Y. 483, 492, and *Bradley v. Holsworth*, 3 Mees. & W. 422, where it was held that the share conferred a right to have a share of the net produce of all the property of the company. Judge Van dissented from the doctrine of the court that the bonds could not be taxed, but in a vigorous opinion sustained the doctrine that the shares of stock were taxable in the state which

was the home of the corporation. Asking the questions: "What are shares of stock and what rights does the owner thereof enjoy?" the judge said:

"Judge Andrews answered this question when he wrote in *Plimpton v. Bigelow, supra*, that 'the right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of a corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts.' Chief Justice Shaw answered it when he said that 'the right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation, to vote in the choice of their officers and the management of their concerns, to share in the dividends and profits and to receive an aliquot part of the proceeds of the capital on winding up and terminating the active existence and operations of the corporation.' "

Many cases are cited in the dissenting opinion sustaining this view, but the substance of all the judicial announcements is that the shares represent an undivided interest in all of the property of the corporation, and that the same right exists whether any certificate to the share has been issued or not; that the issuance of the certificate in no wise affects the right of the shareholders. This doctrine does not in any way conflict with the rule announced by this and other courts that the certificates of shares in corporations are assignable property, and that as much protection as is consistent with the character of the property must be afforded to parties who invest their money in paper of this kind. This becomes necessary for the transaction of modern business. But this ownership of purchased certificates must be subordinate to the laws of the state where the corporation exists. Our statute, Rem. & Bal. Code, § 3693, provides that no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the names and designation of the shares, and the date of the transfer; and we have held that, in an action by an as-

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signee of shares of stock which had been subscribed for by an assignor, a complaint does not state a cause of action when it fails to allege a transfer of the stock upon the books of the company or facts showing the duty of the company to enter the transfer, since it is provided under the statute that such transfer shall not be valid, except between the parties thereto, until the same shall have been entered upon the books of the company. *Lacaff v. Dutch Miller Min. etc. Co.*, 31 Wash. 566, 72 Pac. 112.

In this particular case, there is no danger of any wrong being done to any *bona fide* owners of this stock; for, under the answer of the defendant Dawson, the certificates could go out of the possession of Dawson only by loss or by theft, and in such case the law is plain that the transfer may be made upon the books of the company upon a proper showing. The corporation will be protected because, under the general rule, a corporation should not cancel the certificate of stock and issue other certificates in lieu thereof except upon an indemnity bond, for the reason that the owners of the shares of the stock could hold them responsible. They are not held responsible where the corporation is compelled to make a registry by legal proceedings. In such case, they cannot be held liable to the holders of the outstanding certificate. 2 Cook, Corporations, § 361. Such being the law, the constructive notice which was given to defendant Dawson brought him within the jurisdiction of the court; and from the whole case, it is manifest that the shares of stock are subject to administration in this state, and should be turned over to the possession of the administrator in Spokane county, and that the defendant corporation should account to the owner of the stock for the dividends which have accrued upon said stock.

The judgment will therefore be reversed, and the court will enter a judgment against Dawson, commanding him to turn over said certificates to the appellant, the administrator of Dawson's estate in this state, where the question of heir-

ship or who is entitled to succeed to the possession and interest of the decedent Dawson in the estate may be determined; and the judgment of the court will also be that the defendant corporation shall, in case said shares of stock are not returned, cancel the same, and issue a certificate in lieu thereof to whomsoever is determined by the superior court of Spokane county to be entitled thereto.

CROW, ELLIS, and MORRIS, JJ., concur.

[No. 9866. Department Two. January 30, 1912.]

LOUIS GONTER, *Respondent*, v. KLABER & COMPANY,
Appellant.¹

SALES — BY SAMPLE — SUBJECT TO INSPECTION — BREACH. Where samples of hops were submitted to the purchaser before sale, a sale "subject to inspection" means an inspection to determine whether the hops sold were up to the quality of the sample; and upon inspection, a rejection of hops equal to the sample is unwarranted and a breach of the contract.

SALES — WARRANTY — QUALITY — EVIDENCE — ADMISSIBILITY. Where hops were sold without knowledge by the seller that they were purchased for a particular purpose, evidence on behalf of the buyer as to such purpose is inadmissible.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 25, 1911, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

Marshall K. Snell and Myron C. Cramer, for appellant.

Frank S. Carroll and L. C. Whitney, for respondent.

MOUNT, J.—The plaintiff brought this action to recover damages for the breach of a written contract to purchase a certain quantity of hops. Defendant denied any breach of the contract, and the case was tried to the court without a

¹Reported in 120 Pac. 533.

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jury, and resulted in a judgment in favor of the plaintiff for \$1,558 and costs. The defendant has appealed.

It appears that the parties entered into the following contract:

“Puyallup, Wash., Oct. 13th, 1909.

“In consideration of one dollar, receipt of which is hereby acknowledged, I have this day sold to Herman Klaber and Company, subject to inspection, my entire crop of hops, consisting of one hundred eighteen (118) bales of 1909 crop of hops, at 26 $\frac{1}{4}$ cents per pound, F. O. B. delivered, Alderton, Washington, on or before October 18th, 1909, tare 5 lbs. per bale. Louis Gonter.”

The defendant had received samples and examined a part of the hops prior to the time the contract was entered into. The price of the hops declined after the date of the contract. The hops were afterwards inspected, and defendant refused to accept them. After the defendant refused to take the hops, plaintiff sold the same at twenty cents per pound, and thereafter brought this action to recover the difference between the contract price and the price for which the hops were sold. The trial court found, among other things, “that all of the said 118 bales of hops were at all times, between the 13th day of October, 1909, and the 19th day of November, 1909, of the same quality, grade and market value as the part thereof examined by the defendant before the execution of the said contract,” and concluded that the defendant wrongfully refused to accept said hops. The words “subject to inspection,” used in the contract, clearly meant an inspection for the purpose of determining whether the hops sold came up to the quality of the samples furnished or the bales examined prior to the execution of the contract.

The rule is correctly stated in *Livesley v. Johnston*, 45 Ore. 30, 76 Pac. 13, 946, as follows:

“In a sale like the one at bar, the buyer must also accept, unless, in his honest judgment, exercised in absolute good faith, the commodity is not such as was contracted for. If so exercised, his determination becomes final, because the

parties have so agreed; but if he exercises his judgment arbitrarily, capriciously, or fraudulently, with the sheer purpose of avoiding his obligation to accept, it will not avail him, as the actual quality and condition of the hops may then be inquired into, notwithstanding his adverse determination."

It is true, an inspection was made and a part of the hops, viz., eighteen bales thereof, were conceded to equal the samples. It is conceded also that the price of hops had declined materially at the time they were inspected. There is some dispute as to whether the inspector rejected hops at the time of the inspection, but it was shown, we think conclusively, that the one hundred bales were all as good as, or better than, the eighteen bales which were conceded to be sufficient. We are satisfied, also, that the inspection made was an arbitrary one, for the purpose of avoiding the obligation rather than of determining the quality of the hops, and there is ample evidence to support the finding quoted above that all of the hops were of the same quality and grade as the eighteen bales mentioned.

Appellant argues that the court erred in not permitting evidence to show that the hops were purchased for a particular purpose. The contract does not so show, and it is not claimed that the plaintiff knew of this purpose or agreed to it. The contract was a plain, simple contract, not subject to construction except in the particular above mentioned, and the court properly excluded this evidence.

We are satisfied that the judgment is right, and it is affirmed.

DUNBAR, C. J., FULLERTON, MORRIS, and ELLIS, JJ.,
concur.

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[No. 9845. Department Two. January 30, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY BARR
et al., *Appellants*.¹

EXTORTION—ELEMENTS OF OFFENSE—EXTORTION BY THREATS. The defendants are guilty of extortion by threats, where they accused the prosecuting witness of adultery and demanded the payment of money as satisfaction, which he at first refused, although they later enforced their demands by violence.

SAME—VALUE OF PROPERTY—CHECK WITHOUT CASH VALUE. Under Rem. & Bal. Code, § 2610, defining extortion of money or property by threats or accusation of crime, and § 2303, providing that the word "property" shall include all instruments or writings completed and ready to be delivered by which any right is or purports to be evidenced or created, one may be guilty of extorting a check, although it had no actual cash value from the fact that it would not have been cashed; as the claim which might have been made thereon imported value.

Appeal from a judgment of the superior court for King county, Main, J., entered July 3, 1911, upon a trial and conviction of extortion. Affirmed.

McBurney & Cummings, H. McC. Billingsley, and Holzheimer & Herald, for appellants.

John F. Murphy, Alfred H. Lundin, and Reah M. Whitehead, for respondent.

MOUNT, J.—The defendants were convicted of the crime of extortion. They have appealed from the sentence which followed.

The information charged them as follows:

"They, said Harry Barr, alias Harry Emmett, May Barr, and Harry H. Carroll, and each of them, in the county of King, state of Washington, on the 27th day of January, A. D. 1911, then and there wilfully, unlawfully, and feloniously did verbally threaten one John C. Robey, to accuse said John C. Robey of having committed the crime of adultery

¹Reported in 120 Pac. 509.

with one May Barr, a married woman, and not the wife of said John C. Robey, and by means of such threat, the said Harry Barr alias Harry Emmett, May Barr and Harry H. Carroll, and each of them, did then and there wilfully, unlawfully and feloniously extort from said John C. Robey certain property, to wit, a bank check in the words and figures following:

“ ‘Seattle, Washington, January 27th, 1911. No. 119.

“ ‘The National Bank of Commerce (T-3)

“ ‘United States Depositary.

“ ‘Pay to the order of Cash——\$250.00 Two Hundred and Fifty Dollars.

“ ‘John C. Robey, Mgr. Golden West Bk. Co.’

said bank check being then and there of the value of two hundred and fifty dollars (\$250.00) in lawful money of the United States and the property of said John C. Robey.”

It is argued, first, that the court erred in not directing a verdict of acquittal at the close of the state's evidence, for the reason that the prosecuting witness signed the check through fear of personal violence, and not through fear of the threat to accuse him of the crime of adultery. The facts are substantially admitted. It is needless for us to set them out as testified by the prosecuting witness, further than to say that the defendants all accused the witness of the crime of adultery, and for that reason demanded that he pay them money. He at first refused, but after maltreatment and being held a prisoner in the defendants' room, he yielded to their demands and executed a check as alleged in the information. It is apparent that the primary cause of the issuance of the check was the wrongful accusation. The defendants did not try to rob him by violence. They accused him of a crime, and demanded money as satisfaction therefor. They enforced their demands by violence, but this did not change the real character of the demand, which was to extort money by reason of the accusation.

Referring to the other point sought to be made by the appellants, the defendants called as a witness the cashier of the bank upon which the check was drawn. This witness

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testified that he would not have cashed the check because of the apparent irregularity of the signature. The check was not presented for payment. Defendants were arrested before they had an opportunity to do so. The trial court struck out the evidence to the effect that the cashier would not have cashed the check. It is now argued that this was error, and shows that the check obtained was of no value, and for that reason the case should have been dismissed. The statute provides as follows:

“Every person, who, under circumstances not amounting to robbery, shall extort or gain any money, property or advantage, or shall induce or compel another to make, subscribe, execute, alter or destroy any valuable security or instrument of writing affecting or intending to affect any cause of action or defense, or any property, by means of force or any threat, either—

“(1) To accuse any person of a crime . . . Shall be guilty of extortion,” etc. Rem. & Bal. Code, § 2610.

Section 2303 provides:

“In construing the provisions of this act, save when otherwise plainly declared or clearly apparent from the context, the following rules shall be observed: . . .

“(9) The word ‘property’ shall include both real and personal property . . .

“(11) The term ‘personal property’ shall include . . . all instruments or writings completed and ready to be delivered or issued by the maker, whether actually delivered or issued or not, by which any claim, privilege, right, obligation or authority, or any right or title to property real or personal, is, or purports to be, or upon the happening of some future event may be evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged, or affected, and every right and interest therein.”

It is apparent that the statute above quoted does not require that the property thus obtained shall have actual cash value. The fact that the property obtained was a check or writing by which a claim against the bank or the drawer could have been made, or a right charged or affected by an

endorsee or holder, imported value, and therefore was sufficient under the statute.

We are satisfied that the court did not err in striking this evidence, or in refusing to dismiss the case. The judgment is therefore affirmed.

DUNBAR, C. J., FULLERTON, MORRIS, and ELLIS, JJ., concur.

[No. 9717. Department One. January 31, 1912.]

CHARLES BENSON, *Appellant*, v. THE CITY OF HOQUIAM,
Respondent.¹

MUNICIPAL CORPORATIONS—FILING CLAIMS—NECESSITY—VERIFICATION OF CLAIM—STATUTES—CONSTRUCTION. Laws 1909, p. 627, requiring claims against a city for personal injuries to be filed within thirty days, giving the residence of the claimant, specifying the items of damage, and verified, is mandatory and an action cannot be maintained unless the claim filed complies with all the requirements.

SAME—NOTICE OF CLAIM—SUFFICIENCY. In such a case, notice to the city officers by a claimant resident in the city cannot take the place of the claim required to be filed with the city clerk.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 8, 1911, dismissing an action against a city upon sustaining a demurrer to the complaint. Affirmed.

Morgan & Brewer, for appellant.

James P. H. Callahan and Boner & Boner, for respondent.

CHADWICK, J.—Plaintiff claims to have been injured as the result of the negligence of the defendant, a municipal corporation. Within the time limited by law and ordinance, he presented his claim in form following:

“You are hereby notified that on the 13th of September, 1910, at about the hour of 8:30 o’clock in the evening of

¹Reported in 121 Pac. 58.

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Opinion Per CHADWICK, J.

said day, at the corner of the intersection between 'K' street and Emerson avenue in the city of Hoquiam, I received an injury through and by reason of falling or being thrown to the street—a portion of the planking having been removed, leaving an opening in said street through the carelessness and neglect of the officers, agents and employees of the city of Hoquiam; that there was no light placed at said opening in the street nor was there any protection placed around the opening in said street nor warning of a dangerous place being given in any way; that I claim and demand as damages against the city of Hoquiam, for such injuries the sum of \$5,000, and I herewith make demand for settlement in said sum."

This was presented to the city council, and by it referred to the city attorney. No action having been taken within sixty days, this action was begun. After the time for filing had run, plaintiff went to the city clerk's office and attached an affidavit or verification, in which the requirements of the act of 1909, p. 627 (Rem. & Bal. Code, § 7998), were set out. It is earnestly argued that the claim notice is sufficient under many decisions of this court, and this may be true; but after these decisions were pronounced, and presumably to change the rule of law announced therein, the legislature provided by a general law that a sufficient claim must be filed within thirty days, and that all such claims shall set forth specifically the things which we had for the most part held unnecessary in the decisions relied on.

In the case of *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113, a demurrer was sustained because the claim was insufficient, and although we reversed the case because we were unwilling to hold that either the law of 1909 or the charter provisions of the city applied to employees, we nevertheless held, having in mind the history of the act of 1909, that "the statute is mandatory." In *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, it was likewise contended that a notice omitting some of the statutory requirements would sustain an action, under the authority of the case of *Hase v.*

Seattle, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938, and kindred cases. The court refused to extend the doctrine of that case, saying: "We think the better rule is that a statute of this character is mandatory, and that a compliance with its provisions is a condition precedent to the bringing of the action."

The further distinction was pointed out by Judge Parker in his concurring opinion, where, although subscribing to the doctrine of the *Hase* case, he says: "I regard the real distinction . . . to be that the requirement for filing the claim here involved is found in a state law;" while, as he clearly shows, the former cases proceeded upon the theory that a city could not limit its liability by a charter provision.

Plaintiff further pleads the fact that he is a resident and property owner in Hoquiam, and that he had notified the police officers and the officers of the city of his injury. This does not meet either the letter or the intendment of the law. *Cole v. Seattle*, 64 Wash. 1, 116 Pac. 257.

Judgment affirmed.

PARKER, CROW, and GOSE, JJ., concur.

[No. 10012. Department Two. January 31, 1912.]

MAY N. HEUSTON, *Appellant*, v. THE CITY OF TACOMA,
Respondent.¹

MUNICIPAL CORPORATIONS — STREETS — ABANDONMENT — VACATION. The condemnation and improvement of a new street, covering part of, and to take the place of, an old street, the use of which as a street has since been abandoned by the city, and which formerly gave the only access to plaintiff's abutting property, does not constitute a vacation of the old street so as to vest title to the old street in the plaintiff; in view of Rem. & Bal. Code, § 7840 *et seq.*, providing the manner in which street vacations may be obtained by persons owning an interest in abutting property, as the same provides an exclusive remedy, without which the council has no power to vacate streets.

¹Reported in 120 Pac. 872.

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Opinion Per DUNBAR, C. J.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 28, 1911, upon sustaining a demurrer to the complaint in an action to quiet title. Affirmed.

T. W. Hammond, for appellant.

T. L. Stiles, F. R. Baker, and Frank M. Carnahan, for respondent.

DUNBAR, C. J.—The complaint alleges, that the plaintiff is the owner in fee simple, and is in possession, of the following described real property, situate within the county of Pierce, and the city of Tacoma, viz., lots 13, 14, and 15, of block 7, in Byrd's addition to Tacoma, and of all the land lying between the easterly end of said lots and the westerly line of South I street in said addition, and also all the land lying between the easterly end of lot 16, in said block, and the westerly line of said street; that the defendant unjustly claims some right, title, or easement in the land aforesaid, adverse to the plaintiff, which said claim is without foundation in law; that on July 6, 1897, a map of Byrd's addition was filed in the office of the auditor of said county, and Sixth street, as designated and shown on said map, was dedicated to the public as a street; that at said time, and for many years thereafter, lots 13, 14, 15, and 16, above mentioned, fronted on said Sixth street, and the owner of said lots owned the fee of the land to the center of said street in front of said lots, subject only to the right of the defendant and of the public to use such street as a highway; that said Sixth street was never opened, graded, improved, or used by the public as a highway; that, during the year 1904, the defendant, by appropriate proceedings, condemned a highway eighty feet in width through said addition, and named the same South I street; and thereupon in the same year opened, graded, and otherwise improved said South I street, and established parking and built sidewalks on each side of said street; that ever since 1904 the defendant has maintained

and used said South I street, in place and stead of said Sixth street, as a public highway; that said South I street is ample for accommodation of the public travel, and that in said year the defendant substituted the street condemned by it as aforesaid (South I street) in place and stead of the street originally dedicated to the public (Sixth street), and totally abandoned for street purposes the premises in front of said lots 13, 14, 15, and 16; that by its improvement of South I street, by grading, parking and building sidewalks, etc., and the abandonment of said Sixth street, the defendant deprived plaintiff of all access from a public street to her said lots, except by way of an alley at the back of the same; also shown on said map; that no part of the land claimed is situate within the boundaries of said South I street, and that all of said premises were within the boundaries of said Sixth street as originally laid out and dedicated, and were abandoned by the defendant for use as a public highway when it substituted South I street for Sixth street, as aforesaid, during the year 1904. The court was asked to adjudge that the plaintiff was the owner of the premises described, free from any lien claims of the defendant; that the defendant be adjudged to have no right, title, easement, or interest in or to said premises, and that it be forever barred and enjoined from asserting any claim of right, title, easement, or interest in or to said premises. To this complaint a demurrer was interposed, to the effect that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, judgment of dismissal was entered, and from this judgment this appeal is taken.

So that the question presented here is, did the action of the city in condemning land east of the original boundaries of Sixth street, and in making the improvements as alleged in the complaint, have the effect of abandoning that portion of Sixth street which is not incorporated within the improvements made upon South I street. The appellant has cited many cases to sustain her claim that such was the effect of

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the condemnation proceedings and of the improvements; and that therefore the land on Sixth street, which was not incorporated within the improvements on I street, reverted to the adjoining owners. But whatever may be said of those cases, conceding that they were properly decided under the circumstances of the respective cases, they are not applicable to this case under the special provisions of our statute. Rem. & Bal. Code, § 7840, and subsequent provisions of the Laws of 1901, pages 175 and 176, provide the manner in which streets or alleys may be vacated, and a *modus operandi* is there provided for any person who owns an interest in real estate abutting upon any street or alley to obtain such vacation, the result of which would be to vest the title and use of the land in such joint owners. We cannot but construe this statute as providing an exclusive remedy. Such was the construction placed upon it by this court in *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797, where it was said, in determining the invalidity of an ordinance:

“We are clearly of the opinion that it is invalid. The law delegating to municipalities the power to vacate streets, Laws 1901, p. 175, prescribes a mode for its exercise and the conditions upon which it can be exercised.”

After setting forth the statute, the court said:

“These were matters going to the power of the council to act, and without a substantial compliance with them, any ordinance or vacation based thereon must be void.”

There is no claim in this case that the provisions of the statute were complied with, or even invoked in any degree. The only procedure pleaded by the appellant was a condemnation proceeding. In such proceeding, the city was successful, and doubtless paid for its acquirements. This could not in any way affect or divest its interest in Sixth street as it was originally acquired.

The judgment is affirmed.

FULLERTON, MORRIS, MOUNT, and ELLIS, JJ., concur.

[No. 9739. Department Two. February 2, 1912.]

VINNIE TAYLOR, *Respondent*, v. SPOKANE, PORTLAND &
SEATTLE RAILWAY COMPANY, *Appellant*.¹

CARRIERS—INJURY TO PASSENGERS—EVIDENCE—RELEVANCY—DAMAGES—APPEAL—HARMLESS ERROR. Upon an issue as to the amount of damages sustained by a passenger in a head-on railway collision, in which several passengers were killed, the company admitting negligence causing the accident, it is not prejudicial error to receive in evidence a photograph of the wrecked train showing the force and disastrous nature of the wreck (MORRIS and CHADWICK, JJ., dissenting).

EVIDENCE—DAMAGES—MENTAL SHOCK—ADMISSIBILITY—RES GESTAE. Upon an issue as to the amount of damages sustained in a railway collision by a passenger who was thrown to the floor and suffered traumatic neurasthenia, evidence of shock from the sight of mangled and bleeding passengers while plaintiff was being conveyed to the city in a street car, medical experts testifying that such sight might contribute to plaintiff's injuries, is admissible as a direct or proximate result of the accident and part of the *res gestae*, where it was only a repetition or continuation of what plaintiff had seen or experienced to a greater degree on the wrecked train (MORRIS and CHADWICK, JJ., dissenting).

NEW TRIAL—MISCONDUCT OF COUNSEL—DISCRETION—APPEAL—REVIEW. The refusal of a new trial for misconduct of counsel in argument to the jury is largely in the discretion of the trial court, and it is not an abuse of discretion to deny a new trial, where, in an action for injuries sustained in a railway wreck through the admitted negligence of the railway company, the only issue being the amount of the damages, counsel for plaintiff commented on the gross negligence of the defendant in an improper and inflammatory manner, and upon exceptions taken, the court ruled that the question of negligence had been eliminated and was not within the issues; especially where the trial court reduced the amount of the verdict rendered.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$7,000, for personal injuries resulting in traumatic neurasthenia, reduced by the trial judge to \$5,000, is not excessive where the condition is serious and probably permanent.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 14, 1911, upon

¹Reported in 120 Pac. 889.

the verdict of a jury rendered in favor of the plaintiff, in an action by a passenger for injuries sustained in a collision. Affirmed.

Cannon, Ferris, Swan & Lally, for appellant.

Robertson & Miller, for respondent.

CROW, J.—Action by Vinnie Taylor against Spokane, Portland & Seattle Railway Company, a corporation, to recover damages for personal injuries. From a judgment in plaintiff's favor, the defendant has appealed.

On April 9, 1910, two of appellant's trains, traveling in opposite directions, collided in the city of Spokane. The respondent, a passenger, was riding in a day coach, which was not derailed. Other coaches left the track; some passengers were killed and others were injured. Respondent claims that she was thrown against the arm of a car seat, thence to the floor; that temporarily she became semi-unconscious; that while she lay upon the car floor, wounded passengers from another car passed by; that they were mangled, bleeding and crying with pain; that she was assisted to a street car upon which she rode to a hotel; that on the street car was another passenger injured in the wreck who was covered with blood and repeatedly complained that his partner had been killed; that the cries and mangled appearance of the injured and wounded shocked and distressed her; that she sustained an injury to her back, has since suffered intense pain, can only walk slowly, cannot climb stairs, cannot work, has headaches, and at frequent intervals is afflicted with severe illness. The evidence went to the issue whether she had suffered traumatic neurasthenia, and if so, whether her condition was caused by the accident, or resulted from a severe illness and surgical operation which she had sustained a year or two previously, and from which she and the surgeon who performed the operation testified she had fully recovered. The

evidence was conflicting, but the jury, under the instructions of the trial court, found in respondent's favor, and returned a verdict for \$7,000 damages. Upon the hearing of a motion for a new trial, this sum was conditionally reduced to \$5,000 by the trial judge, for which judgment was entered in respondent's favor.

The appellant did not dispute its negligence; nor did it deny its liability for any injuries which may have resulted to respondent. The jury found the respondent's neurasthenic condition had been caused by the injury and shock resulting from the collision. The controlling issue was the amount of damages to be awarded. Appellant contends that the trial judge erred in admitting evidence of the presence of injured passengers on the street car, and also erred in admitting a photograph of the wrecked trains; that counsel for respondent was guilty of prejudicial misconduct, and that the damages are still excessive. We fail to see the materiality of the photograph or that its admission was prejudicial. The presence and conduct of the injured passenger on the street car was only a repetition or continuation of what the respondent had seen and experienced to even a greater degree before leaving appellant's passenger coach in which she had been injured. The accident occurred in a remote section of the city. The passengers could not reach their destinations on the wrecked train. Some of them, including respondent, rode on the street car. The relation or condition in which she was thus placed was a direct or proximate result of the accident, and very properly might be regarded a part of the *res gestae*. There was evidence of physicians tending to show that the sight of mangled, bleeding and suffering passengers might cause a shock which would contribute to respondent's present condition. She suffered such a shock and experience in a greater degree before leaving the train than after, and we fail to understand how admission of the evidence of which appellant complains was prejudicial.

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Counsel for respondent in his closing argument to the jury said:

"Now he says, gentlemen of the jury, that 'the question of negligence in this collision is eliminated from this case, why this talk by counsel on the other side of negligence, gross negligence here, why there is no evidence of gross negligence; we might have done this and we might have done the other thing in this case' and he contends that the question of negligence is eliminated. Now the court says the question is eliminated, not because negligence is taken out of the case, but because of the admission of the defendant; and if there was no other testimony in the case but the admission, there would be no question but that the plaintiff would be entitled to recover; negligence has not been eliminated from this case because this admission of the negligence in the collision is the very reason why the case goes to you practically solely upon the amount that will be allowed. I say that there is evidence of the grossest negligence in this case. Here are these two trains upon the same track, loaded with human freight, here they are rushing into the night with a speed of, the speed that the evidence states, here they are crashing into each other, with the groaning and screaming of human souls going down to their death, I say is evidence of the grossest negligence in this case; and if there is any attempt to eliminate it, it is because they do not desire that an impression should be made upon this jury, before this jury, that this was the grossest character of negligence, and the admission of the fact that it is negligence is in connection with the evidence of the case that it was gross negligence, and that it is for your consideration and in fact there can be no question of it. Can one railroad train jump over another on a track, can one passenger train coming at full speed pass another on the same track, does not the railroad company know that, is there a man so dull who would say that that is not evidence of negligence, and counsel here before he examined this jury said that the negligence of the collision would not be denied by this corporation."

Thereupon the following colloquy occurred:

"Mr. Cannon (attorney for appellant): Just one minute.
Mr. Robertson (attorney for respondent): He is not—
Mr. Cannon: Counsel— Mr. Robertson: —permitted

now— Mr. Cannon: If the court please. I want to take an exception to the discussion of the question of whether there was gross negligence, or whether there was negligence in this case; the question of negligence is out of it, and this can be for no other purpose than to prejudice the jury in this case; it is not a subject for discussion, and I take an exception to the remarks of counsel on that question. Mr. Robertson: The question of the accident and the character of the collision— Mr. Cannon: Oh, no; the discussion of whether or not this was gross negligence; this tirade on gross negligence. The Court: I think the question of negligence, Mr. Robertson, has been eliminated, as I instructed the jury. Mr. Robertson: Then this instruction if your honor please is to be construed that it is admitted that the defendant was negligent at the time of the happening of the collision, so that if the plaintiff was injured at that time she is entitled to a verdict. Mr. Cannon: No this is what is admitted: that the defendant does not deny its responsibility for injuries that she may have suffered because of that wreck. And all this talk of gross negligence is prejudicial, and I take an exception to it. Mr. Robertson: I submit, if the court please, that I am entitled to discuss fully the facts in this case in my own way. Mr. Cannon: I wish to save an exception, however. The Court: I think, however, that the question of whether there was gross negligence, or slight negligence, is not within the issues in this case. Mr. Robertson: The words 'gross negligence' if your honor please being used by me simply to show the character of that collision. Mr. Cannon: I except to the counsel's discussion of negligence at all. We assumed responsibility for the result of the accident, and the counsel knows it; why, he would have been trying this case for another week if we hadn't admitted that."

Appellant now contends that, in making this argument, counsel for respondent was guilty of such flagrant misconduct as to require a new trial. We agree with the contention that the argument was improper and inflammatory, and that it should have been omitted, as no issue of negligence or gross negligence was before the jury. Yet, on the record before us, we cannot conclude that a new trial should be granted. We do not know what may have provoked this outburst.

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The first portion of counsel's statement indicates that it might have been provoked by some previous argument of counsel for appellant. But as to that we are not informed. The trial judge heard all the arguments, observed their effect upon the jury, and saw everything that occurred. When counsel for appellant interposed his objection, the trial judge, in the presence of the jury, said: "I think the question of negligence, Mr. Robertson, has been eliminated as I instructed the jury." The record shows that he had theretofore so instructed the jury in the clearest and most explicit terms. The trial judge again said: "I think, however, that the question of whether there was gross negligence or slight negligence is not within the issues in this case." Appellant's counsel did not move the court to strike the offensive language, nor did he ask any further instruction to the jury. The jury undoubtedly were men of sufficient intelligence and judgment to appreciate the statements and comments of the trial judge. The granting of a new trial for misconduct of counsel rests largely within the sound discretion of the trial judge. He is in a better position than an appellate court to appreciate and know the effect of any alleged misconduct, and to observe whether it results in prejudice. In the recent case of *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88, we said:

"We have held by an unbroken line of decisions that a motion for a new trial is necessarily addressed to the sound discretion of the trial court, and when the motion has been granted for insufficiency of evidence the order will not be disturbed unless the evidence is undisputed or the discretion has been clearly and, as said in one case, grossly abused. . . . The same rule applies with at least equal force where a new trial is granted on account of misconduct of counsel. Indeed, the reasons for the free exercise of a wide discretion are even more potent in such a case than in case of insufficiency of evidence. In the nature of the thing there is no other person or body to whose discretion such a question can be addressed in the first instance, while the question of

sufficiency of evidence is primarily one for the jury. In reason, therefore, and by analogy to other cases of primary cognizance, the court's discretion should be a real one, and its exercise should not be disturbed except in case of clear abuse."

We there sustained an order granting a new trial for misconduct of counsel. On the same principle, we should sustain an order denying a new trial, unless the record affirmatively shows the trial judge has abused his discretion. The only possible effect of the misconduct of which appellant complains would be upon the amount of damages awarded. The trial judge, in the exercise of his discretion, reduced the damages awarded by the jury, and denied the motion for a new trial on condition that respondent consent to such reduction, which she did. The trial judge saw the respondent, knew her condition, heard the evidence and the arguments of counsel, and in the exercise of his judgment and discretion concluded that the damages for which judgment was finally entered would not be excessive. He corrected any prejudicial effect that may have resulted to appellant either from misconduct of counsel or from rulings on the admissibility of evidence, even though such rulings be regarded as technically erroneous. The only purpose of a new trial in this action would be to fix compensatory damages to which the respondent is entitled. That purpose has already been accomplished, through the medium of the former trial, the verdict of the jury, and the final action of the trial judge.

Appellant contends the damages are still excessive. There was sufficient evidence to show that respondent was injured, and that as a result of her injuries she is seriously affected with traumatic neurasthenia, which in all probability will permanently continue. Language used by this court in *Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914, when passing on a claim of excessive damages, is especially pertinent here. From the entire record, and in view of the fact that the trial

judge sustained the verdict to the extent of \$5,000, we conclude no further reduction should be made.

The judgment is affirmed.

DUNBAR, C. J., and ELLIS, J., concur.

MORRIS, J. (dissenting)—I am, for two reasons, unable to concur in this affirmance. Under the admission of the appellant the only questions to be passed upon by the jury, and therefore the only issues upon which evidence was admissible, were the nature and extent of respondent's injuries and the amount to be awarded her as damages. The admission of other evidence was improper, and if it was of such a character as would produce a prejudicial effect upon the jury, such admission should be held error. The two photographs showing the result of the collision, the twisted and broken cars of these two trains in the head-on collision, upon the trestle, could have been offered but for one purpose, and that, to show the gross negligence of the company in permitting such a collision at such a place. Such evidence could have had but one effect upon the jury, convincing them of the gross negligence of an operating system that would permit such a collision. Respondent was not riding in any of the cars shown in these photographs. She had no knowledge of the situation shown. No injurious effect could have come to her because of the scenes therein depicted. It was not claimed such situation in any way contributed to her injuries, or had any mental or physical effect upon her. The only purpose of their admission in the case was to influence the jury against the appellant upon a question not an issue before them. I cannot escape the conclusion it was prejudicial error.

The description of the ride in the street car, the detailing minutely of the bloody appearance of one of the passengers, the gaping wound in his head, his cries over the killing of his friend, the effect upon respondent, and the embodiment of these facts in the hypothetical questions propounded the

medical witnesses, also constituted error. Appellant was in no way responsible for what took place on the street car. It placed neither the injured man nor the respondent upon the car. She was a passenger thereon of her own volition, and any injury to her while such a passenger would not be attributed to the appellant. It was not a part of the *res gestae* any more than if this injured man, driven frantic by his own injuries and the loss of his friend, had in his frenzy committed a physical injury upon respondent. Who can say to what extent the medical men based their opinion of respondent's condition upon the result of the shock she received while on the street car, or how much it may have contributed to the finding of the jury as to the extent of those injuries. Ordinarily I should not like to disturb a verdict solely because of the admission of improper testimony unless the error was so flagrant as to deprive a litigant of a fair and impartial trial upon the issues before the court. Believing this to be such a case, I dissent. The judgment should be reversed and a new trial ordered.

CHADWICK, J., concurs with MORRIS, J.

[No. 10158. Department One. February 2, 1912.]

JOHN A. SODERBERG *et al.*, Respondents, v. A. C. McRAE
et al., Appellants.¹

APPEAL—NOTICE OF APPEAL — PARTIES — DISCLAIMER OF INTEREST. Upon appeal from a judgment in an action to quiet title, defendants who appeared and filed an answer amounting to a disclaimer asking no costs or relief, and setting up no title or interest as required by Rem. & Bal. Code, § 794, are not necessary parties to the appeal upon whom notice of appeal need be served, where they ceased to have any interest in the controversy, were treated as if in default in all subsequent proceedings, and were not mentioned in the decree except in the caption.

¹Reported in 120 Pac. 878.

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Opinion Per CROW, J.

Motion to dismiss an appeal from a judgment of the superior court for San Juan county, Joiner, J., entered October 8, 1911, in favor of the plaintiffs, in an action to quiet title. Denied.

James Kiefer and *R. E. Morris*, for appellants.

Shank & Smith, for respondents.

CROW, J.—Action by John A. Soderberg and Martha Soderberg, his wife, against Puget Sound Portland Cement Company, a corporation, M. H. Walter, A. J. Tennant, Richard A. Ballinger, Orcas Lime Company, a corporation, A. C. McRae, Mary E. McRae, his wife, and Pacific Coast Portland Cement Company, a corporation, to quiet title to real estate in San Juan county. From a decree in the plaintiffs' favor, the defendants A. C. McRae, Mary E. McRae, and Pacific Coast Portland Cement Company have appealed.

The respondents have moved to dismiss for the reason that no notice of appeal has been served upon the defendants A. J. Tennant and Richard A. Ballinger, who had appeared herein. The motion is before us on a short record, undisputed affidavits, and agreed statements of counsel made upon the oral argument. It is conceded that the action was commenced to quiet title, and that the only allegation of the complaint relative to Tennant and Ballinger was that they were trustees of the defendant Puget Sound Portland Cement Company, a corporation alleged to have been dissolved. No allegation was made that they held any possession, interest, or title in or to the real estate. No return of service upon them was filed. The defendant Orcas Lime Company, appearing by James Kiefer, its attorney, filed its separate answer. The defendants A. C. McRae, Mary E. McRae and Pacific Coast Portland Cement Company, appearing by the same attorney, filed their separate answer. In March, 1911, respondents served notice of the taking of depositions upon the defendants represented by Mr. Kiefer, but made no service upon Tennant and Ballinger or either of them.

The cause was tried on April 12, 1911. At some time on that date, Tennant and Ballinger, without the knowledge of appellants, filed an answer, the clerk's filing fee being paid by respondents. This answer, which was not verified, contained admissions of certain allegations of the complaint, but denied others for want of knowledge or information sufficient to form a belief as to their truth or falsity. No affirmative defense was pleaded; nor did the answer contain any prayer for dismissal, for costs, or for any relief whatever. Tennant and Ballinger, and their counsel who signed the answer, each and all of them, were absent from the trial, which proceeded without their participation. A. J. Tennant died testate in August, 1911, but his death was not suggested to the trial court, nor was his executrix substituted as a party defendant. Defendants caused the final decree to be entered on October 3, 1911, after his death, and the notice of appeal was served on November 21, 1911. The decree mentions the names of Tennant and Ballinger in its caption only. It adjudges respondents to be the beneficial owners of the land, appoints a commissioner to convey to them, and awards them costs against A. C. McRae, Mary E. McRae and the Pacific Coast Portland Cement Company. No costs were awarded to or against Tennant or Ballinger. A proposed statement of facts was filed by appellants, and certified by the trial judge. It is conceded that it recites appearances as follows: "The plaintiff John A. Soderberg appeared in person and by Corwin S. Shank and H. C. Belt, his attorneys; the defendants A. C. McRae and wife and Pacific Coast Portland Cement Company by R. E. Morris and James Kiefer, their attorneys, and the defendant Orcas Lime Company by James Kiefer, its attorney." No other appearances are mentioned. In January, 1912, when appellants learned that Tennant and Ballinger had appeared by answer, they procured and filed a disclaimer, which, omitting the title of the cause, reads as follows:

"The undersigned Richard A. Ballinger, one of the de-

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fendants in the above entitled cause, and Sine I. Tennant, executrix of the last will and testament of and sole devisee in the last will and testament of A. J. Tennant, who departed this life on the 19th day of August, 1911, hereby waive the right of appeal in the above entitled cause, and service of notice of appeal and filing of statements of facts and disclaim and waive all interest in the subject-matter of the above entitled cause, with the same force and effect as of the date of decree.

“Dated this 11th day of January, A. D., 1912.

“Richard A. Ballinger,

“Sine I. Tennant, as executrix and sole devisee of the last will and testament of A. J. Tennant, deceased.”

We attach no importance to this instrument, further than its indication that Tennant and Ballinger themselves construed their answer to be a disclaimer. On the argument, it was conceded that neither the appellants nor their attorneys, at any time prior to January 11, 1912, had knowledge or notice of the answer or appearance of Tennant and Ballinger, or of any service upon them.

Respondents, in support of their motion, cite the following cases: *State v. Seaton*, 26 Wash. 305, 66 Pac. 397; *First Nat. Bank v. Gordon Hardware Co.*, 31 Wash. 682, 72 Pac. 464; *Wax v. Northern Pac. R. Co.*, 32 Wash. 210, 73 Pac. 380; *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Davis v. Tacoma R. & Power Co.*, 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; *Willard v. Fisher*, 36 Wash. 229, 78 Pac. 917; *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723; *Beckman v. Brommer*, 57 Wash. 436, 107 Pac. 190; *Robertson Mtg. Co. v. Thomas*, 60 Wash. 514, 111 Pac. 795; *Robertson Mtg. Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312.

We have stated the facts and the proceedings with much detail to show their dissimilarity from those in any of the cases cited. The only cases from which the right to an order of dismissal herein could by any possibility be inferred are

Robertson Mtg. Co. v. Thomas, 60 Wash. 514, 111 Pac. 795, and *Robertson Mtg. Co. v. Thomas*, 63 Wash. 316, 115 Pac. 312, both arising from the same action. We have examined the final decree there entered and find that the names of the defendants who had appeared, but were not served with notice of appeal, were specifically mentioned in the decree itself, and that they were parties thereto. We conclude, for reasons hereinafter stated, that the defendants Tennant and Ballinger were at no time entitled to prosecute an appeal from the final decree. This is an action to quiet title. The respondents claiming the real estate made Tennant and Ballinger parties defendant. If Tennant and Ballinger, who were not in possession, held or claimed any interest, lien or title in or to the real estate, the duty devolved upon them, under Rem. & Bal. Code, § 794, to plead the same. Failing to do so, they could either default or appear and disclaim. They appeared, but their answer amounted to a disclaimer, and thereafter they ceased to have any interest in the controversy. They failed to plead any title, interest, or possession in themselves, and under § 794, *supra*, could offer no evidence thereof. This being true the demands of their answer amounted to a disclaimer only. We therefore conclude that appellants' failure to serve them with notice of appeal was not a fatal omission. It is apparent that appellants have served all defendants who to their knowledge had appeared, and all who have any possible interest; that in so doing they brought before this court all parties necessary to a determination of any issue that can be raised upon the appeal, and that no party has been deprived of his right to an original appeal or a cross-appeal. This being true it would require too harsh a construction of the appeal statute to hold the notice defective for want of service upon the defendants Tennant and Ballinger. The motion to dismiss is denied.

DUNBAR, C. J., PARKER, CHADWICK, and GOSE, JJ., concur.

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Opinion Per PARKER, J.

[No. 10105. Department One. February 2, 1912.]

FRANK H. PILLING, *Appellant*, v. THE CITY OF EVERETT
*et al., Respondents.*¹

MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT—MANDATORY EXPENSES. Indebtedness incurred by a city for the salary of its officers, wages of employees for necessary services and for material and supplies in the conduct of its necessary affairs, is valid although in excess of the constitutional limit of indebtedness.

SAME—INDEBTEDNESS—VALIDATIONS—DEBTS THAT CAN BE VALIDATED. Indebtedness incurred by a city in excess of the constitutional limit of five per cent may be validated by an election if, at the time of the election, the debt did not exceed such constitutional limit, and if it was incurred for a bridge or like property, comparatively new and in the possession and beneficial use of the city.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 28, 1911, upon an agreed statement of facts, dismissing an action in equity. Affirmed.

J. W. Dootson, for appellant.

Benj. W. Sherwood (*Earl W. Husted*, of counsel), for respondents.

PARKER, J.—The plaintiff, a taxpayer of the city of Everett seeks to have the city and its officers enjoined from paying certain warrants, alleged to have been issued for indebtedness of the city which was incurred at a time when its indebtedness was in excess of five per cent of the assessed value of the taxable property within the city. A trial upon the merits resulted in a denial of the relief sought and a dismissal of the action. From this disposition of the cause, the plaintiff has appealed.

After issues were made by the pleadings, an agreed statement of facts was signed and filed by the attorneys for the respective parties, upon which the trial court evidently dis-

¹Reported in 120 Pac. 873.

posed of the cause without any other facts being before it. The warrants here involved were issued between April 8, 1909, and October 8, 1910, presumably for indebtedness incurred about the time of their issuance. This indebtedness was incurred at a time when the city was in debt to an amount exceeding five per cent of the assessed value of the taxable property therein. The corporate authorities deeming it advisable that this indebtedness be validated by the voters of the city, on May 8, 1911, passed an ordinance submitting that question to the voters at a special election to be held June 18, 1911. An election was held on that day accordingly, when all of this indebtedness was ratified by the affirmative vote of more than three-fifths of the voters of the city voting at that election. At that time the total indebtedness of the city did not exceed five per cent of the assessed value of the taxable property therein. This ratification election was held under the provisions of chapter 120, p. 614 of the Laws of 1911. It is not contended that there was any failure to comply with the provisions of this law in submitting the question of the ratification of the indebtedness to the voters of the city. No formal findings of fact were made by the trial court, but recitals were made in its judgment as follows:

“That the warrants set forth in plaintiff’s complaint were each for mandatory expenses of said city, and that the election was duly held validating said warrants at a time when the city of Everett was within its five per centum limit of indebtedness, and that said warrants are legal and valid warrants and obligations against said city of Everett.”

Exception was duly taken by counsel for appellant to the recitals in the judgment which in effect find that the warrants were issued for mandatory expenses of said city and are valid obligations against the city.

The principal contention of counsel for appellant is that the court erred in holding that the indebtedness evidenced by these warrants was for “mandatory expenses of said city.” It is conceded that by the use of these words, the learned

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trial court meant that the indebtedness was of that nature which the city might lawfully incur notwithstanding the city had passed the debt limit, prescribed by § 6, art. 8 of the constitution, under the following decisions of this court: *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 58 Am. St. 52, 36 L. R. A. 407; *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717; *Hull v. Ames*, 26 Wash. 272, 66 Pac. 391, 90 Am. St. 743.

The only evidence we have touching the nature of the various items of indebtedness for which these warrants were issued is that contained in a list of the warrants set forth in the agreed statement of facts, and the very general statement contained in the ordinance providing for the election. The list of warrants contains evidence of a very brief and limited character touching the nature of the several items of indebtedness. After the number of each warrant, its date, its amount, and the name of the payee, there follows a very brief statement of the nature of the service rendered or property furnished the city for which the particular warrant was issued. There is, however, enough there stated to warrant the conclusion, in the absence of other evidence, that the warrants were all issued in payment of the salaries of the officers of the city, the salaries and wages of other employees of the city for services rendered by them in the necessary conduct of the city's ordinary affairs, or for material and supplies furnished the city which were necessary for its use in the conduct of its ordinary affairs, with the exception of some items, which we will notice later. This being true, it seems unnecessary to discuss the effect of the validating election upon the validity of these items of indebtedness, as, under the decisions above cited, they would be valid in any event.

The other items of indebtedness here involved we think were rendered valid by the vote of the people at the time the city was within its five per cent debt limit, even though that limit was unlawfully exceeded when such debts were originally attempted to be incurred. It appears that the city con-

structed a bridge over the Snohomish river, attempting to incur an indebtedness therefor of some \$48,000. We will assume that at that time this indebtedness was invalid because it exceeded, not only the one and one-half per cent debt limit, but also exceeded the five per cent debt limit, and that it was an obligation which could not be then incurred or validated even by a vote of the people. Constitution, art. 8, § 6. This is one of the items attempted to be ratified by the election. This record, though not directly so showing, warrants the conclusion that, at the time of the holding of this election, the bridge was in the possession of the city and used by it as its property. The date of its construction renders it clear that it was, at the time of the election, comparatively new. We see no reason why the people, by their vote at that election validating that indebtedness, may not be held to have, by their votes, then accepted the bridge and in effect created that indebtedness. Surely the bridge and its future use was a sufficient present consideration to support such a promise as the people, by their votes, then made to the holders of the warrants issued in payment therefor. This would seem to be the logical result, since it is clear that there was then ample power to acquire the bridge and incur such debt therefor without exceeding the five per cent debt limit.

All of the other items of indebtedness involved which required validation by vote of the people were rendered valid by the election because the record warrants the conclusion that they were incurred for property then comparatively new, and in the possession and use of the city, as the bridge then was. We are of the opinion that the debts evidenced by the warrants involved in this case are rendered valid; either by the fact that they were for such necessary expenses as fall within the previous holdings of this court above cited, and were valid even though they exceed the constitutional debt limit, or fall within that class to which the bridge belongs, which were validated—or we might better say—re-created by the validating election at a time when their crea-

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tion did not result in the total debt of the city exceeding the five per cent debt limit.

We express no opinion upon the power of the people to validate a debt attempted to be incurred in excess of the five per cent limit, by an election held at a time when the city's debt exceeds that limit, and for something that the city could not receive any benefit from after such election. In such a case, it might be argued that the city would receive no lawful consideration for its promise to pay such a debt. This is quite a different question from the validation of this bridge debt and others of the same class.

We conclude that the judgment must be affirmed. It is so ordered.

DUNBAR, C. J., CROW, CHADWICK, and GOSE, JJ., concur.

[No. 10045. Department One. February 2, 1912.]

THOMAS A. LYNCH, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY *et al.*, *Appellants*.¹

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$23,895, reduced by the trial judge to \$14,000, for injuries sustained by a locomotive engineer in a wreck, will not be disturbed on appeal as excessive, where he sustained a Pott's fracture of the ankle and a fracture of the skull and a cut across the nose and cheek, resulting in impaired sight and hearing, in traumatic neurasthenia, permanent lameness, weakness and loss of health, there being no way to measure his earning capacity with exactness.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In a personal injury case, an irrelevant instruction going only to the measure of damages is not prejudicially erroneous, where the verdict was reduced by the trial judge in a substantial degree.

DAMAGES—PERSONAL INJURIES—HUMILIATION—INSTRUCTIONS. In a personal injury case, an instruction authorizing the jury to consider injuries which render the plaintiff an object of pity or ridicule should not be given unless the injury is such as to shock the senses of fair-minded men or invite the unfeeling to ridicule.

¹Reported in 120 Pac. 882.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered September 15, 1911, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a railway engineer in a collision. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellants.

Hayden & Langhorne, for respondent.

CHADWICK, J.—Plaintiff, forty-six years old, a railroad engineer, for twenty years in the employ of the defendant the Northern Pacific Railway Company, was injured in a collision occurring on December 8, 1910. The negligence of the company is admitted, and to use the words of defendants' counsel: "The only question to be determined is the extent of plaintiff's injuries and the amount to be recovered therefor."

Plaintiff suffered a Pott's fracture of the left ankle, and a fracture of the outer plate of the frontal bone of the skull, and it is possible that the inner plate was also fractured. He was cut across the forehead, the cut extending over the bridge of the nose and into the cheek, a part of which was gouged out, although the wound has so healed that the scar is hardly perceptible. He suffered a severe shock, and was confined to the house about two months, and has since been on crutches. The clinical effect of the injury, taking plaintiff's case as the jury did, is that his injuries have permanently impaired his health and strength, and to some extent his faculties. His left ankle is so stiffened that he cannot now, and in all probability never will be able to, perform manual labor "like the ordinary man;" that he cannot get on and off an engine with comfort; that time may improve his condition, but it is likely that he will have to walk with a cane the rest of his life; that he is suffering from traumatic neurasthenia, from which a recovery is hardly to be expected when the victim is past forty; that he has lost weight,

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his normal weight being 170 to 175 pounds, whereas it was at the time of the trial 140 to 145. His memory has been somewhat impaired, while his sight and hearing are not more than fifty per cent of the normal. There is a watering and a slight twitching of one eye, and he suffers from head noises or rumbling sounds in the head. He complains of sleeplessness, and such weakness that the slightest physical exertion is said to cause profuse perspiration. There was some testimony tending to show that he had aged prematurely after the injury. The testimony of the physicians appointed by the court would tend to show that the neurasthenic condition will improve after this suit is terminated. Plaintiff was earning at the time of his injury from \$140 to \$170 a month. The jury returned a verdict for \$23,895. This was reduced by the trial judge to \$14,000. From a judgment for this amount, defendant has appealed, assigning that the verdict as amended by the court is still excessive, and that one of the instructions given by the court was erroneous and prejudicial.

We are not prepared to say that the verdict as amended is excessive. It is substantial, and may be larger than any of us would have been willing to return if we had been jurors. But the difficulty in this class of cases is that we have no test by which verdicts can be truly measured. If passion and prejudice are to be inferred from the mere size of the verdict, or it appears to be for such an amount as to seem penal rather than compensatory, the trial judge, who saw plaintiff and could more truly measure his condition and the probable consequences of his injuries, has exercised that discretion which many consider to be doubtful and all agree should be rarely exercised. Where the injury is such that it affects only the earning capacity of the party, so that compensation can be measured with some degree of mathematical exactness, this court has sometimes made conditional reductions of judgments. But in cases of this character where the earning capacity of the party injured is purely problematical,

we have quite consistently refused to interfere either with the verdict of the jury or the discretion of the trial judge. *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311; *Reeks v. Seattle Elec. Co.*, 54 Wash. 609, 104 Pac. 126; *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743; *Nelson v. Western Steel Corp.*, 61 Wash. 672, 112 Pac. 924.

The court instructed the jury:

"If you find that the plaintiff has sustained injuries which make him an object of pity to his fellow men and an object of ridicule to the thoughtless and unfeeling and deprive him of the comfort and companionship of his fellows, then the one causing such injury should respond in damages therefor."

The court then proceeded to give the jury a measure of damage based upon the actual injuries as shown by the evidence. That part of the instruction which we have quoted is assigned as error, and it is defended upon the authority of *Cole v. Seattle, Renton etc. R. Co.*, 42 Wash. 462, 85 Pac. 3, from the text of which it seems to have been taken. The objection to this instruction goes only to the measure of damages and, inasmuch as the verdict was reduced by the trial judge in a substantial degree, we hardly think we would be justified in holding that a new trial should be had, although we feel warranted in saying that we do not commend the practice of giving an instruction when no clear reason other than that it has been passed with approval in some other case is offered. We have frequently said that this class of cases speak for the most part their own law, and it is for that reason that care should be exercised to see that instructions bear some relevancy to the facts in the particular case. This court will not, and trial courts should not, assume that every person injured is an object of pity or ridicule, or will by reason of his injuries be deprived of the comfort and companionship of his fellow men, for it is not so. Nor was the instruction complained of held to be proper under the facts brought to this court in the *Cole* case. The extent of the court's holding was that, inasmuch as the jury saw the in-

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jured party and heard him testify, its knowledge was such that, if the facts did not sustain the instruction, it must have rejected it; or as stated by the court: "We would not be justified in assuming they were in any way misled by the wording of the instruction." Unless an instruction is based upon evidence or an injury is disclosed that would shock the senses of fair-minded men, or invite the unfeeling to ridicule, an instruction like the one complained of should not be given. It can serve no purpose other than to invite the jury to wander in the field of speculation, and to put a burden upon a defendant which is penal rather than compensatory in its nature.

Judgment affirmed.

DUNBAR, C. J., CROW, PARKER, and GOSE, JJ., concur.

[No. 10097. Department Two. February 2, 1912.]

GEORGE W. MOORE, *Respondent*, v. W. J. BLACKBURN *et al.*,
Appellants.¹

PRINCIPAL AND AGENT—EMPLOYMENT OF AGENT—BROKERS—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show that a broker to secure a loan was the agent of the borrower to pay off a prior mortgage on the property, where it appears that he was employed by the borrower for a commission, that the lender, who was to have a first mortgage lien and had no knowledge of the first mortgage, drew a check for the amount of the loan in favor of the broker to enable him to draw the money and obtain his commission, the borrower not being known at the bank, whereupon these two went to the bank to draw the money, it being previously agreed that the broker should discharge all liens on the property; but the mortgage was not discharged, the borrower later conveying the land and leaving the state, and the broker having paid interest on the first mortgage for a time and committed suicide upon the matter being investigated; hence the borrower's grantee is chargeable with payment of the first mortgage.

¹Reported in 120 Pac. 875.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 17, 1911, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Allen & Allen, for appellants.

S. W. Farquhar and *Warren H. Lewis*, for respondent.

MORRIS, J.—Appellant Blackburn was the owner of property in the city of Seattle, upon which there was a mortgage of \$1,000, and other liens approximating \$700. He desired to unite these liens in one loan, and applied to J. R. Kellogg, a loan broker, for a loan of \$1,750. Kellogg found respondent willing and able to make the loan, and after some negotiations, including the examination of an abstract by Kellogg, the parties met in Kellogg's office on December 23, 1908, to complete the transaction. Respondent, at the request of Blackburn and Kellogg, made out a check for \$1,750, payable to Kellogg, partly to enable Kellogg to get his commission and partly because Blackburn was unknown at the bank, and Kellogg and Blackburn went to the bank to obtain the money. It had been previously agreed between Blackburn and Kellogg that Kellogg would take the proceeds of the Moore loan and pay off the \$1,000 mortgage and the other liens, so that the \$1,750 mortgage would be the only lien against the property. It cannot be determined from the record what became of the money after the cashing of the check, as Blackburn had left the country after conveying the property to his codefendant, Walter B. Allen, on July 21, 1909, and Kellogg is dead. However, whoever as between Blackburn and Kellogg undertook to pay off the first mortgage, neglected to do so, and it is still an existing lien against the property, and the question to be determined on this appeal is whether the amount now due upon it is chargeable to respondent, upon the theory that Kellogg was his agent, and he must suffer for Kellogg's neglect, or whether both mortgages shall be treated as existing liens against the property.

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The answer to this question is to be determined by our conclusion as to whose agent Kellogg was in retaining the money to pay off the first mortgage and other liens. Agency is a fact to be determined by the peculiar circumstances of each case; so that there are many cases holding that the broker who acts as intermediary between the parties is, under some conditions, the agent of one party, and under other conditions, the agent of the other party. It seems to us, however, that the problem must be solved by determining under whose direction the broker was acting. It is plain from the record that Kellogg was acting under the direction of Blackburn in undertaking to pay off the first mortgage. There is no evidence before us that respondent had any knowledge of these prior liens. In fact, the only evidence is that he at no time knew of them prior to November, 1910. What became of the money is unknown. If Blackburn took it, respondent cannot be charged with his failure to pay off the mortgage. If Blackburn left it with Kellogg for that purpose, which we are inclined to believe from the fact that Blackburn had consented that he should do so, instead of his attorney J. H. Allen, and that Kellogg subsequently paid interest on it, then, for this purpose, he was the agent of Blackburn, and Blackburn and his grantees must suffer for his failure to fulfill his duty. There can be no dispute from this record that Moore, at the time of the loan, had no knowledge of this first mortgage. How, then, could he make Kellogg his agent to do something the necessity for which had at no time and in no manner been called to his attention? Under these circumstances, the following cases are in point in holding that the broker is the agent of the borrower: *Englemann v. Reuse*, 61 Mich. 395, 28 N. W. 149; *Lipman v. Noblit*, 194 Pa. St. 416, 40 Atl. 377; *Pepper v. Cairns*, 133 Pa. 114, 19 Atl. 336, 19 Am. St. 625, 7 L. R. A. 750.

It is undisputed that Kellogg was employed by Blackburn to obtain this loan, and was to be paid a commission for his services. This fact alone, under the ruling of many cases,

would make him the agent of Blackburn. *Thomas v. Desney*, 57 Iowa 58, 10 N. W. 315; *Johnson v. Shattuck*, 67 Ark. 159, 53 S. W. 888; *Knox County v. Goggin*, 105 Mo. 182, 16 S. W. 684; *Cooper v. Headley*, 12 N. J. Eq. 48; *Lantry v. Sutton*, 5 N. Y. Supp. 14.

If Blackburn was relying upon appellant's agent to pay off the first mortgage, it seems strange that, from December 23, 1908, until his deed to Allen, July 21, 1909, he made no effort to ascertain if such payment had been made. His silence is not so strange if he undertook to do so himself, or made Kellogg his agent for that purpose. It is clear that respondent believed he held a first mortgage, and that, as soon as he was informed that he did not, he went to Kellogg's office to ascertain the truth of the fact; and while he was making an investigation, Kellogg committed suicide. All these facts convince us, it was represented to respondent that he was to hold a first mortgage, and that he at all times believed he so held. The testimony of counsel for appellants establishes the fact that Blackburn agreed that Kellogg should hold the money and pay off the liens for him. Upon all the facts, we are clear that Kellogg was Blackburn's agent for the purpose of making these payments, and that the judgment of the lower court is right.

Appellants suggest in their brief that the court erred in not allowing a continuance to obtain the testimony of Blackburn. Upon reviewing the record on this matter, we find no error in the court's ruling.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and ELLIS, JJ., concur.

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[No. 9682. Department One. February 2, 1912.]

W. J. ROBERTSON, *Respondent*, v. C. H. O'NEILL,
Administrator etc., Appellant.¹

EVIDENCE—DOCUMENTARY EVIDENCE—ACCOUNT BOOKS. In an action on open account by one employed by defendant's decedent as a timekeeper and bookkeeper, plaintiff's journal entries of the items charged at varying intervals, seemingly made in the usual course of business, are admissible in evidence, where the deceased frequently examined and checked the books, and slept in the office where they were kept during the times in question; and they are not rendered incompetent by the fact that some of the items were of money advanced by the plaintiff.

SAME—ACCOUNT BOOKS—ERASURES. An objection to account books on account of erasures goes to the weight and not to the competency of the evidence.

WITNESSES—COMPETENCY—TRANSACTION WITH DECEASED. In an action on open account against defendant's decedent, it is incompetent, under Rem. & Bal. Code, § 1211, excluding evidence of transactions with the deceased, for plaintiff to testify that the deceased checked over the account and approved it.

SAME—TRANSACTIONS WITH DECEASED—WAIVER OF OBJECTIONS. Objections to evidence of the adverse party as to transactions with the defendant's decedent are waived where the defendant, after objection, extended the cross-examination beyond the scope of the testimony in chief, introduced evidence on the subject, and called such adverse party as a witness and sought to use his testimony to the extent that it might be beneficial in defeating his claim or establishing a claim in favor of the estate.

EVIDENCE—RELEVANCY—COLLATERAL MATTERS—ACTIONS AGAINST DECEASED—CIRCUMSTANTIAL EVIDENCE. In an action on open account by a bookkeeper and timekeeper, employed by defendant's decedent on contract work, in which plaintiff seeks recovery for moneys advanced to the deceased in addition to wages, it is error to exclude evidence offered by the defendant to show that the contract was a profitable one on which there was a large sum due the deceased at the time of his death, as tending to show that deceased would not have borrowed money from plaintiff; circumstantial evidence being especially admissible in favor of the estate of a deceased person.

¹Reported in 120 Pac. 884.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered April 27, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon an open account. Reversed.

Wakefield & Witherspoon (*A. C. Shaw* and *E. P. Twohy*, of counsel), for appellant.

Nuzum & Nuzum and *Geo. H. Armitage*, for respondent.

GOSE, J.—The plaintiff brought this suit to recover upon an account for money advanced and services rendered to the deceased in his lifetime. There was a verdict and judgment for the plaintiff for \$1,465.80. The defendant has appealed.

The answer denies the claim of the respondent, and pleads a counterclaim against him for \$2,283. The deceased was a railroad contractor, and in the fall of 1909 and the winter of 1909 and 1910, was engaged in construction work on the Des Chutes river, in the state of Oregon. The respondent was his timekeeper and bookkeeper at that point, from some time in August, 1909, until about the close of April, 1910. The respondent and the deceased went to Spokane on April 30, and remained there until the death of the deceased, on June 23 following. The respondent was permitted to introduce in evidence certain pages of the journal which he kept for the deceased during his employment, upon which he had entered the cash and labor charges for which a recovery is sought. The journal where these items appear comprises a series of entries seemingly made in the usual course of business. The respondent's account is shown in the body of these entries at varying intervals. The respondent testified that the deceased frequently examined and checked the books, and that he and the deceased, while the work was doing, slept in the office where the books were kept.

The admission of the journal entries in evidence is the first error claimed. We think they were competent testimony under the circumstances stated. The appellant's argument

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assumes that the journal was the respondent's book in so far as he made the charges in his behalf. As we have seen, the charges in his favor were interspersed with other items arising in the usual course of business which the deceased was conducting. The fact that some of the entries represent money advanced to the deceased does not, under the attending circumstances, render the book incompetent. *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *Cormac v. Western White Bronze Co.*, 77 Iowa 32, 41 N. W. 480; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Lewis v. England*, 14 Wyo. 128, 82 Pac. 869, 2 L. R. A. (N. S.) 401; *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551.

As was said in the *Cormac* case, the respondent made the entries not for himself but for his principal and as his agent, and the books were the books of the principal and admissible as evidence against him. In the *Lewis* case, it is said that, where cash entries appear in the general course of accounts as a part of the regular course of business transacted, they are competent evidence. Some criticism is made of certain items on account of erasures. The objection goes to the weight of the evidence, and not to its competency. *Wolferman v. Bell*, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. 126.

The respondent was permitted to testify that the deceased checked over his account, said that he approved it, and that it was correct. The second assignment of error is directed to the admission of this evidence. It was clearly incompetent under the provisions of Rem. & Bal. Code, § 1211. The error was, however, waived by the appellant. After reserving his exception to the evidence, he cross-examined the respondent touching a number of items in the account, and then had him identify the checks of the deceased issued to the respondent at Spokane between April 30 and June 23, 1910; had him admit that he received these checks aggregating in amount \$1,583, and that he cashed them and received the money. He later called the respondent as a wit-

ness, and had him identify the signatures to certain exhibits. The court permitted the respondent to explain why the checks were drawn in his favor, and to state that he gave the money which they represented to the deceased. The appellant also assigns error in the admission of this evidence. The purpose of the statute is to prevent the living from taking an unfair advantage of the estate of the dead. It would, however, be palpably unjust to permit the representative of a deceased person to use the adverse party to the extent that it might aid him in defeating a claim or in establishing an independent claim in favor of the estate, and then claim the benefit of the statute when the adverse party sought to qualify or explain his testimony. This the law will not permit. *Young v. Montgomery*, 161 Ind. 68, 67 N. E. 684; *Gilbert v. Swain's Estate*, 9 Ind. App. 88, 36 N. E. 374; *Strode v. Frommeyer*, 115 Mo. App. 220, 91 S. W. 167; *In re Dunlap's Estate*, 94 Mich. 11, 53 N. W. 788; *In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193; *Thomas v. Irvin*, 90 Tenn. 512, 16 S. W. 1045; *Comstock's Adm'r. v. Jacobs* (Vt.), 78 Atl. 1017; *Allen v. Shires*, 47 Colo. 433, 107 Pac. 1070.

A like rule applies where the cross-examination is extended beyond the scope of what the witness would have been permitted to testify in chief upon direct examination. *Pierce Loan Co. v. Killian*, 153 Mo. App. 106, 132 S. W. 280; *Edwards v. Latimer*, 183 Mo. 610, 82 S. W. 109; *Edwards v. White* (Tex. Civ. App.), 120 S. W. 914. The logic of the cases is that the party who invokes the protection of the statute must himself respect it.

The deceased did not make final settlement of his account for the railroad work. He was paid \$2,500 on account by the original contractors, when he had finished his contract and before returning to Spokane. He deposited \$2,000 of this amount in a Spokane bank, and had withdrawn it at the time of his death. The appellant sought to prove that the contract had been a profitable one, and that there was a balance of more than \$4,000 due at the time of the death of the

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deceased. It was contended by counsel in making the offer that it was a circumstance tending to show that the deceased did not borrow money from the respondent. The offer was denied. This we think was error. While as a rule inquiry will not be permitted as to collateral matters, the evidence here offered would have shown that there was no apparent reason why the deceased should have borrowed money from the respondent, either during the progress of the work or after its completion. *McCowan v. Northeastern Siberian Co.*, 41 Wash. 675, 84 Pac. 614; *Wheeler v. Buck & Co.*, 23 Wash. 679, 63 Pac. 566; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101.

In the *McCowan* case the court said:

"It is held by this court, in common with many other courts, that, in controversies where a special agreement is alleged on one side and denied on the other, it is relevant to put in evidence any circumstances which tend to make the question at issue more or less probable; this, not to change the contract, but as evidence of what it was."

In the *Wheeler* case it is said that, in an action upon a contract for work, when the testimony is conflicting as to the contract price, it is competent to show the value of the work at the time the contract was made as tending to show what the agreed price was. It has many times been said, and cannot be doubted, that circumstantial evidence is just as competent as, and often more potent than, direct evidence. In the trial of a case, any circumstance is admissible which reasonably tends to establish the theory of the party offering it, or to explain, qualify, or disprove the testimony of his adversary. When death has stilled the lips of one of the parties to the transaction and a demand is being asserted against his estate, his representative should be permitted to combat the claim with any circumstance reasonably tending to shed light upon the transaction in controversy.

The judgment is reversed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 10163. Department Two. February 3, 1912.]

CANAL LUMBER COMPANY, *Respondent*, v. KONG YICK
INVESTMENT COMPANY, *Appellant*, WASHINGTON
INTERIOR FINISH COMPANY, *Respondent*.¹

APPEAL—BONDS—OBLIGORS. An appeal will be dismissed where the bond on appeal was given by one as principal who was not a party to the action, and conditioned that he would pay any judgment that might be rendered against him, and against whom no judgment could be rendered (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 20, 1911, upon findings in favor of the plaintiff. Appeal dismissed.

Tucker & Hyland, for appellant, in opposition to the motion to dismiss the appeal, cited: *Bloomingtondale v. Weil*, 29 Wash. 611, 70 Pac. 94; *Dossett v. St. Paul & Tacoma Lumber Co.*, 31 Wash. 489, 72 Pac. 116; *Cook v. Tibbals*, 12 Wash. 209, 40 Pac. 935; *Dahl v. Tibbals*, 6 Wash. 259, 31 Pac. 868; *Hill Estate Co. v. Whittelsey*, 21 Wash. 142, 57 Pac. 345; *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; *Fidelity & Deposit Co. v. Seattle, Renton & Southern R. Co.*, 50 Wash. 391, 97 Pac. 453; *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723; *Wilson v. Puget Sound Elec. R. Co.*, 50 Wash. 596, 97 Pac. 727; *Westland Pub. Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096; *Drouilhat v. Rottner*, 13 Ore. 493, 11 Pac. 221; *Johnson v. Johnson*, 31 Ohio St. 131.

Walter L. Johnstone, for respondent.

PER CURIAM.—Respondent moves the dismissal of the appeal herein because no bond has been filed. A bond was filed by one Hans Pederson, as principal, with two sureties. It is conditioned that Hans Pederson will pay any judgment

¹Reported in 120 Pac. 882.

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that may be rendered against *him* upon the appeal or the dismissal thereof. Pederson was not a party to the action, and no judgment could be rendered against him. No judgment could be rendered against the sureties upon an affirmation of the appeal, because they had not so agreed. The case is governed by the rule in *Bruhn v. Steffins*, 66 Wash. 144, 119 Pac. 29, and must be dismissed. It is so ordered.

FULLERTON, J. (dissenting)—I am unable to concur in the order of dismissal. The right of appeal is, in this state, a constitutional right; hence, any statutory regulation thereof cannot be in any sense jurisdictional. True, the legislature may, in the interest of uniformity, limit the time in which appeals may be taken, prescribe the manner and form of taking them, and otherwise regulate the procedure therein, and the courts will obey such regulations, in so far as they are reasonable and do not amount to a denial of the right. And since the statute does not grant the right, but merely regulates the right, the court should treat such statutes as it treats the statutes regulating the proceeding by which actions are brought and prosecuted in courts generally; it should entirely disregard informal violations of the procedure, and should allow all formal violations to be corrected whenever they are capable of being corrected. In the case before us, there is no reason why the defect found in the bond should not be corrected by the giving of a new bond. This can be done without injury to the other side, and without delaying the hearing of the cause on its merits in this court. Moreover, as I read the statutes, we are directly commanded to allow such amendments to be made. By section 1734 of the Code (Rem. & Bal.) it is provided that "no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal, if the appellant shall forthwith, upon order of the supreme court, perfect the appeal."

In this case, the appellant has, pursuant to the terms of the foregoing statute, asked to be permitted to perfect its appeal, and has tendered for filing a bond regular in form and substance. To refuse it permission to do so is, to my mind, to visit upon it a penalty so far disproportionate to the offense committed as to amount to a denial of justice.

[No. 10031. Department Two. February 5, 1912.]

GUSTAF W. SWANSON, *Appellant*, v. SOUND CONSTRUCTION
AND ENGINEERING COMPANY, *Respondent*.¹

MASTER AND SERVANT—FELLOW SERVANTS—TEMPORARY STAGING—DETAILS OF WORK. A carpenter's helper who fell from temporary staging which he was assisting in building, cannot recover of the master for negligence of the carpenters in nailing a support with only one nail near its upper edge and in using cross-grain material, where the plan of construction was a good one and sufficient material was furnished and the carpenters were competent and made their own selection of materials and used their own judgment as to the number of nails required; since the accident was due to the neglect of fellow servants in mere details of the work (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Prigmore, J., entered June 19, 1911, upon the verdict of a jury rendered in favor of the defendant by direction of the court, dismissing an action for personal injuries sustained by a carpenter's helper in a fall from a scaffold. Affirmed.

Philip Tindall and Jackson Silbaugh, for appellant.

Hughes, McMicken, Dovell & Ramsey, Otto B. Rupp, and *J. B. Joujon-Roche*, for respondent.

MOUNT, J.—This action was brought to recover for personal injuries sustained by reason of the fall of a scaffold on which the plaintiff was working. At the trial the court di-

¹Reported in 120 Pac. 880.

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rected a verdict for the defendant, and dismissed the action. The plaintiff has appealed.

The facts were as follows: The defendant was constructing an engine house for the Great Northern Railway Company. This building was 100 by 104 feet in size. The side-walls were completed and the roof timbers were to be placed in position. In order to place these roof timbers, it was necessary to erect a temporary stage. One of the carpenters working on the building drew a rough sketch of a plan for the scaffold on a piece of ship lap. Mr. M. A. Brown, the foreman, worked this plan out to scale in the form of a blue print, and directed the scaffold to be built according to that plan. This plan consisted of a series of stages, each seven feet high, rising from the top of the walls of the building, after the manner of steps at each end of the scaffold, and conforming to the shape of the roof. The upright pieces to support this staging were constructed in pairs the width of the scaffold. These pairs of uprights, as they approached the center of the building from each side, were respectively seven, fourteen, twenty-one, and twenty-eight feet in height. Pieces two by eight inches in size, called ledger-boards, were nailed across each pair of uprights at seven-foot intervals from the bottom. The purpose of these ledger-boards was to support the planks upon which the workmen were to stand upon the platform or scaffold. The scaffold thus constructed was designed to be used by the workmen in raising a number of roof timbers into place, and then the scaffold was to be taken down and reconstructed for placing another set of roof timbers, and so on across the building. The foreman, Mr. Brown, directed two carpenters, viz., George Lohse and Pete Smith, to construct the scaffold according to this plan. A sufficient supply of lumber and nails was upon the ground. The plaintiff was a laborer working as a carpenter's helper, and assisted these two carpenters in the construction of the scaffold. The foreman,

Mr. Brown, and Mr. Lohse, a member of the defendant company, were about the work and assisted in raising some of the uprights into place. Other men were working around the building. While the plaintiff was assisting in placing the planks for the floor upon the ledgerboards at the twenty-one foot level, a ledgerboard gave way, and he fell that distance and received his injuries. It appears that the ledgerboard which gave way had only one nail to hold it to the upright. This nail was near the top of the board. This board split at the point where the nail was driven, and caused plaintiff to fall. It is not shown that the board was split when the nail was driven. It is very probable that, when the weight of the floor and the weight of the man came together upon the board, it gave way.

There is no claim made that the plan or design of the scaffold was insufficient or defective, or that the carpenters who did the work were not skillful; but it is claimed by the appellant that, because the defendant, through its foreman, furnished the design and directed the scaffold to be constructed according to the design, and supervised the workmen and at times assisted in the construction, the defendant is liable under the rule in *Ralph v. American Bridge Co.*, 30 Wash. 500, 70 Pac. 1098; *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058; *Cheatham v. Hogan*, 50 Wash. 465, 97 Pac. 499, 22 L. R. A. (N. S.) 451, and *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888. In each of these cases the scaffold, or other agency which caused the injury, was a completed appliance which the servant had not constructed, and he therefore did not know of its weakness and did not know and was not warned of any defects. In *Ralph v. American Bridge Co.*, *supra*, we said:

“The present case may be distinguished from a class of cases which have frequently arisen where temporary staging is used by workmen as a part of the details of their ordinary work and erected from time to time by themselves. The ma-

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son or carpenter who, in common with his fellows in the same occupation, erects scaffolding, or carries a ladder for such use, which he furnished himself, assumes the risk of his work in the safety of such scaffold or ladder."

This distinction is obvious. It is clear that the scaffold in this case was one being constructed by the workmen in the details of their ordinary work. It is true that the plan was furnished by the foreman of the defendant company, but the plan appears to have been a general plan and the details of the construction, such as the number of nails and character of the materials to be used, were not gone into; and there is nothing in the evidence to show that the carpenters who were set to the construction of the scaffold were directed to place a given number of nails in the cross-pieces or ledgerboards which were to support the floor of the scaffold. These men were permitted to use their own judgment in such matters. And it does not appear that the carpenters or their helper, the plaintiff, were directed to select cross-grain material. They were evidently to make their own selection of materials, which was of good quality and abundantly furnished. It is also true that defendant's foreman was about the work and to some extent directed it, but it is not shown that he knew how many nails were used in each place by the carpenters. This also was left to the judgment of the carpenters, who were skillful men and presumed to know what was required.

The negligence alleged by the complaint is to the effect that the ledger gave way by reason of the fact that it "was nailed to the upright with only one nail, which nail was driven through said ledger near its upper edge; and to the fact that said ledger consisted of cross-grain material." It is apparent that the plan of construction had nothing to do with the accident. The plan was a good one and is not questioned. If the men who did the work had performed their duty and selected and used proper material and sufficient nails, which were at hand, the structure would have been ample. The actual cause of the accident was the failure of these men in a

detail of the work to use a sufficient number of nails. As said above, the plaintiff was a helper and worked with the men who did this work. This cause is clearly governed by the rule in *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114. In that case we said:

“In the case at bar, the respondent through his foreman, Thomas, furnished suitable and adequate materials and competent coservants. He did not undertake to furnish the scaffolding, on which appellant stood when injured, in an adjusted condition. It was usual and customary for the employees, including appellant, while at work on this structure, to construct and adjust staging out of the materials provided by respondent. It is illogical to compare such temporary staging with some machine which is all adjusted, so that its sufficiency can be ascertained before the employee is called upon to use it. We think the action at bar falls within the rule announced in the above authorities, that, where competent men are employed to do some work on a structure upon which scaffolding, or some other appliance to support the workman, is required—‘the employer to furnish the materials, and the employed to construct or adjust the scaffolding or other appliances—the employer is not liable to one of the employees for the careless act of another employee done in the construction, adjustment, or maintenance of the structure or appliance.’ ”

See, also, *Muehlman v. Spokane & Inland Empire R. Co.*, 58 Wash. 327, 108 Pac. 764.

It was not the duty of the master to stand over each man doing work on the scaffold and direct him how many nails he should drive in each place, or to inspect each piece of timber used. These were details of the work which the master might reasonably leave to a competent workman. In order to reverse this case, it would be necessary to hold that the defendant was negligent in not directing every detail of the work. This is not the rule.

The judgment must therefore be affirmed.

DUNBAR, C. J., MORRIS, and ELLIS, JJ., concur.

FULLERTON, J., dissents.

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[No. 9932. Department Two. February 6, 1912.]

MICHAEL BUDMAN, *Respondent*, v. SEATTLE ELECTRIC
COMPANY, *Appellant*.¹

APPEAL — DECISION—LAW OF CASE—MATTERS CONCLUDED—DENIAL OF NEW TRIAL. Upon a former appeal, the reversal of a judgment for defendant notwithstanding a verdict for the plaintiff, upon the ground that the evidence made a case for the jury, establishes the facts as found by the verdict as the law of the case; and on remand, a new trial for insufficiency of the facts to sustain the verdict is properly denied, either as conclusively settled or as within the discretion of the trial court.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 24, 1911, upon the verdict of a jury rendered in favor of the plaintiff, after denying a new trial, in an action for personal injuries sustained by a track laborer struck by a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

Jay C. Allen, for respondent.

MORRIS, J.—This is an action to recover damages for personal injuries, and is now before us for the second time. The trial first resulted in a verdict for respondent; whereupon appellant made a motion for judgment *non obstante veredicto*, coupled with a motion for a new trial. The motion for judgment was sustained, the motion for a new trial not being passed upon, and plaintiff appealed. Upon the appeal being heard, we reversed the judgment of the court below (*Budman v. Seattle Elec. Co.*, 61 Wash. 281, 112 Pac. 356), upon the ground that the evidence was sufficient to take the case to the jury, and remanded the case with instructions to the lower court to pass upon the motion for a new trial, on grounds other than the ones discussed upon the first appeal; and if said motion was denied, to enter judgment upon the verdict.

¹Reported in 120 Pac. 877.

The cause again came before the lower court under this mandate, and the motion for a new trial was denied and judgment entered upon the verdict; whereupon defendant brings the case up on this second appeal.

The writer of this opinion, and one other member of the department sitting on the first appeal, did not join in the decision then reached by the majority of the department, believing that the action of the lower court in granting judgment notwithstanding the verdict should be sustained. The majority having ruled otherwise, it was established as the law of the case that, upon the questions of the negligence of the defendant and the contributory negligence of the plaintiff, the only questions submitted upon the first appeal, there was sufficient evidence to take the case to the jury; and their verdict upon those points should be conclusive. The court below having denied the motion for a new trial, it is apparent that the only reason upon which the court based its ruling involved in the first appeal was, either the contributory negligence of the respondent, or the failure to establish any negligence on the part of appellant. The first appeal being conclusive upon the sufficiency of the showing upon those questions, and the motion for a new trial being denied, we must conclude that the trial court was influenced by no other reason in making its first ruling.

It is unquestioned that, under our statute, it is within the discretion of the lower court, when ruling upon motions for a new trial, to grant the same, when in its opinion the verdict is against the weight of the evidence; but it does not follow that the court should so rule after this court, upon reviewing its ruling, has in effect held otherwise. The lower court's first ruling was to the effect that the facts made the law in this appellant's favor. This court ruled otherwise, holding the facts did not make the law and they should be left to the determination of the jury as questions of fact and not passed upon by the court as questions of law. Neither does it necessarily follow that, upon the first ruling, there

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was any question in the court's mind of either the sufficiency or weight of the evidence; its judgment being reached upon the law as applied to the facts, and not upon the weight or sufficiency of the evidence as establishing the facts in case its conclusion as to the law should be overruled. It may be, also, that, upon hearing the motion for a new trial, the court, upon mature reflection of the whole case, aided by the opinion of this court, reached a different conclusion from that announced in its first ruling, and that it is now of the opinion that the verdict is in accordance with the weight of the testimony.

Finding no error in the ruling complained of, the judgment is sustained.

MOUNT, FULLERTON, and ELLIS, JJ., concur.

DUNBAR, C. J., concurs in the result.

[No. 9767. Department Two. February 6, 1912.]

ELSA ANNA MERZ *et al.*, Appellants, v. THERESA MEHNER
et al., Respondents.¹

TENANCY IN COMMON — RIGHTS AND REMEDIES — QUIETING TITLE. The purchasers of the whole title from a purchaser at a foreclosure sale are not tenants in common of parties to the suit who claimed the right of redemption or an interest which was cut off by the foreclosure sale subject to redemption, and such parties cannot recover an interest as tenants in common, having made no redemption.

MORTGAGES—FORECLOSURE—SALES—TITLE. A mortgage foreclosure sale conveys the whole title subject to redemption with right to possession and rents.

JUDGMENT—BAR—MATTERS CONCLUDED. A judgment quieting title against claims by infants alleging want of jurisdiction to render judgment of foreclosure, is *res judicata* and a bar to a subsequent action seeking to quiet title to the same lands by reason of defendants' collusive agreement with a judgment creditor as to redemption and failure to redeem from the foreclosure sale for plaintiff's benefit.

¹Reported in 120 Pac. 893.

MORTGAGES—FORECLOSURE—SALES—REDEMPTION. A redemption by one who is not a tenant in common or co-owner does not inure to the benefit of others claiming an interest which was sold subject to redemption.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 17, 1911, in favor of the defendants upon the pleadings, dismissing an action to quiet title. Affirmed.

John H. Allen, for appellants.

J. W. Bryan, for respondents.

MOUNT, J.—In this case the lower court sustained a motion of the defendants for a judgment on the pleadings, and dismissed the action. The plaintiffs have appealed.

It appears from the record in the case that, in the year 1906, Anna Merz, the mother of the plaintiffs, and these plaintiffs were joint owners of lots 13 and 14, block 1, of the town of Bremerton. These lots were incumbered by a mortgage and certain mechanics' liens, all of which were afterwards foreclosed, and the property was sold on March 9, 1907, to satisfy the judgments. On April 17, 1907, the defendants purchased the lots from the purchasers at the sheriff's sale. On the same day Anna Merz, the mother of the plaintiffs, conveyed all her interest in the lots to these defendants. Afterwards, in the year 1907, the plaintiffs, through their guardian, brought an action against these defendants and others interested, to set aside the decree of foreclosure and to quiet title of the property in themselves. That action resulted in a judgment quieting title to the lots now in question in the defendants. See *Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118.

Afterwards, this action was begun by the plaintiffs, claiming an undivided one-half interest in the lots. The complaint alleges that, in April, 1907, the mother of the plaintiffs conveyed an undivided one-half interest in the lots to the defendants, who have ever since been co-owners and joint ten-

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ants with the plaintiffs; that the property was improved and the income therefrom amounted to \$120 per month, which greatly exceeded the expenses; that on the 17th day of April, 1907, the defendants, for the purpose of defrauding the plaintiffs, entered into an agreement with a judgment creditor, to the effect that such judgment creditor should redeem the property from a prior sale, and that defendants would not redeem the property for the benefit of themselves and the plaintiffs, but would allow the period of redemption to expire and permit such judgment creditor to secure a deed from the sheriff, and when such deed was delivered such judgment creditor should deed the lots to the defendants for a consideration equalling the amount of such creditor's judgment; that this sum was less than \$1,000; that, notwithstanding the defendants were indebted to the plaintiffs on account of the rents received from the property in excess of the amount necessary to redeem, the defendants permitted the said judgment creditor to redeem in accordance with the above stated agreement, and subsequently took a deed in their own names.

It is at once apparent that the plaintiffs rely upon the alleged fact that they are tenants in common or co-owners with the defendants. But it is also apparent from the whole record, which is set up in the answer and not denied, that the plaintiffs and defendants are not and never have been co-owners or tenants in common. Defendants purchased the lots of a purchaser at the foreclosure sale. They purchased the whole interest of the minors, as well as the mother and others who were parties in those actions and who were then owners. At the time of the purchase, there were no fiduciary relations existing between the plaintiffs and the defendants. The defendants up to that time were strangers to the title. They merely purchased from the purchaser at foreclosure sale, and took his interest subject to redemption by the parties to the action, and other statutory redemptioners. They also acquired the title to all of the interest of

Anna Merz, the mother of these plaintiffs. If the agreement was made as alleged, it did not affect the rights of the plaintiffs.

It was held in *Merz v. Mehner, supra*, that the service in the foreclosure action was good as against these plaintiffs. The sale under the foreclosure, of course, conveyed the whole title subject to redemption. The right of possession and the rents passed also to the purchasers. Rem. & Bal. Code, § 602. The other case, *Merz v. Mehner*, is conclusive of the questions there presented, or which might have been presented. The record here shows that the plaintiffs themselves have not redeemed their interest in the property from the foreclosure sales. The redemption of the defendants did not inure to the benefit of the plaintiffs, because the plaintiffs were not tenants in common or co-owners with the defendants.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, and ELLIS, JJ., concur.

[No. 9892. Department One. February 6, 1912.]

MILAN VELIKANJE, *Appellant*, v. F. STANLEY MILLICHAMP
*et al., Respondents.*¹

LIBEL AND SLANDER—WORDS ACTIONABLE PER SE—PROVINCE OF COURT AND JURY. A letter charging that an attorney presented forged receipts and attempted to collect money on them, is not libelous *per se*, it not being charged that he forged the receipts or that he uttered the same with guilty knowledge of the forgery.

SAME — SPECIAL DAMAGES — PLEADING — NECESSITY. Words not libelous *per se* are not actionable unless special damage is alleged.

SAME—LIBEL PER SE—QUESTION FOR COURT. Whether language is libelous *per se* is a question of law for the court, unless the writing is ambiguous.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 27, 1911, in favor of the de-

¹Reported in 120 Pac. 876.

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fendants, upon sustaining a demurrer to a complaint for libel. Affirmed.

E. B. Velikanje and *Lee C. Delle*, for appellant.

W. G. Beard, for respondents.

CHADWICK, J.—Plaintiff is an attorney at law, duly admitted and in good standing at the bar of the state. He brings this action to recover damages for libel. The material parts of his complaint follow:

“(4) That on or about the 19th day of October, 1910, the said defendants, and each of them, wrote and published of, or caused to be written and published of, and concerning this plaintiff, and of and concerning him in his said capacity and profession of an attorney at law, in a certain letter written to one John Schmidt, of North Yakima, Yakima county, state of Washington, under said date aforesaid, and which said letter was addressed to the said John Schmidt, at North Yakima, Washington, postage prepaid, and deposited in the United States mail, in the city of Seattle, state of Washington, on October 19, 1910, at 2:30 o'clock p. m., a certain false and malicious libel, in words and figures as follows, to wit:

F. Stanley Millichamp.

J. B. Wandesforde.

Empire Produce Company,
Commission Merchants.

Wholesale Fruits and Produce.
Main 8930—Independent 5695.

914 Western Avenue,
Seattle, Wash., Oct. 19, 1910.

Mr. John Schmidt,
North Yakima, Wash.

Dear Sir: Enclosed find check for \$39.34, being net proceeds for balance of peaches not heretofore remitted. You will kindly excuse delay, caused by one Velikanje presenting us with forged receipts, purporting to be from our agent at your city, and trying to collect your money on them. As our record did not quite tally with the receipts, we necessarily had to check up with our Yakima agent, which caused the delay. Under no circumstances would we have paid this party your money, as our rule is to remit direct to the grower, paying no attention to any representatives, unless accompanied by written order from said shippers. We have straightened

out this matter with our agent, and find the number of peaches unaccounted for to be as shown by the enclosed account sales. Hoping our results prove satisfactory, and thanking you for your favors, we are,

Very truly yours,

Empire Produce Co.

By J. B. Wandesforde.

"(5) That the plaintiff is the person referred to in said letter by the name of 'one Velikanje;' that the aforesaid letter was received by the said John Schmidt, in said Yakima county, and read by him and other persons; and that said defendants, and each of them, knew at the time they wrote said letter, or caused the same to be written, that they were charging the said plaintiff with the crime of forgery, and the same was so understood by the said John Schmidt and others.

"(6) That by reason of the said defendants writing, publishing and using the said false and defamatory language aforesaid, the plaintiff has suffered greatly in reputation, his honesty and integrity, and has been greatly injured and prejudiced in his reputation aforesaid, and has been greatly damaged in his profession and business, and has been greatly humiliated, and has suffered both in mind and in body, to his damage in the sum of five thousand (\$5,000) dollars."

A demurrer was sustained to the complaint, and from a judgment of dismissal, plaintiff has appealed.

The demurrer was properly sustained. Respondents did not charge appellant with the crime of forgery, or of uttering a forged instrument. They neither impute a criminal intent nor charge appellant with a guilty knowledge. Unless there be a guilty knowledge, there can be no uttering of a forged instrument within the definition of that crime. *State v. Hatfield*, 65 Wash. 550, 118 Pac. 735; *State v. Peeples*, 65 Wash. 673, 118 Pac. 906. The words charged, not being libelous *per se*, are not actionable unless a special damage is alleged to have resulted to appellant. *Denny v. Northwestern Credit Assn.*, 55 Wash. 331, 104 Pac. 769, 25 L. R. A. (N. S.) 1021.

Appellant contends that the complaint is good within the rule of *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; *Quinn v. Review Pub. Co.*, 55 Wash.

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69, 104 Pac. 181, 133 Am. St. 1016; *Dunlap v. Sundberg*, 55 Wash. 609, 104 Pac. 830, 133 Am. St. 1050, and *Jeffrey v. Gill*, 56 Wash. 586, 106 Pac. 129.

The *Lathrop* case goes no further than to state the general rule:

“It is not necessary that the words published should involve an imputation of crime. It is enough that they be of such a nature that the court can presume, as a matter of law, that they will tend to disgrace the party of whom they are published, or hold him up to public ridicule, or contempt, or cause him to be shunned or avoided.”

We held that to class a reputable physician among quacks, criminal practitioners and charlatans was a libel *per se*. Clearly the words there employed would tend to cause him to be shunned and avoided. In the *Quinn* case there was a direct and open charge of jobbery and graft in the exercise of a public employment. The *Dunlap* case we conceive to be an authority sustaining the ruling of the lower court. Taken without qualification, the *Jeffrey* case might warrant appellant in his assertion that the case should have gone to a jury. But when properly understood, it is in line with our cases, and the universal holding of the courts that the question whether a writing is libelous *per se* is one of law for the court, unless the writing is ambiguous, in which event the truth of the innuendo will be submitted to the jury. In the *Jeffrey* case, although the question was submitted to the jury, the court in so doing practically held the words to be libelous *per se*, they having been spoken publicly and imputing as they did unchastity (25 Cyc. 319); and the issue having been submitted to the jury and being decided right, appellant could not, after verdict, complain of the error. A verdict is vulnerable to attack only when it is contrary to law.

The language used by respondents, being plain and unambiguous, and imputing no crime to appellant, or otherwise assailing him in reputation, is not actionable.

The judgment of the lower court is therefore affirmed.

DUNBAR, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 9925. Department One. February 6, 1912.]

**E. A. FREEMAN *et al.*, Appellants, v. THE CITY OF CENTRALIA
et al., Respondents.¹**

MUNICIPAL CORPORATIONS — STREETS — VACATION—DAMAGES. The vacation of a street will not be enjoined at the suit of citizens whose property does not abut on the vacated portion and access is not cut off, or who do not sustain special physical damage different in kind rather than in degree from that suffered by the public.

SAME. Mere inconvenience from the vacation of a street, where access to property is preserved over other streets, is not a taking of or damage to property not abutting on the vacated portion of the street.

SAME—VACATION—CONTROL BY COURTS. The fact that vacated streets may be put to private uses, and that the vacation was instigated by private interests affected does not warrant interference with the city council's action in vacating the streets; the courts not inquiring into the motive for legislative action.

PLEADING—DEMURDER—LEGAL CONCLUSIONS. A demurrer does not admit facts that may be inferred from a legal conclusion.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered September 11, 1911, upon sustaining a demurrer to the complaint, dismissing an action to restrain the vacation of streets. Affirmed.

John E. Humphries, for appellants.

W. N. Beal, Geo. T. Reid, J. W. Quick, and L. B. da Ponte (*Dysart & Ellsbury*, of counsel), for respondents.

CHADWICK, J.—This is an appeal from an order sustaining a demurrer to a complaint. The appellants are owners of property in the city of Centralia. Magnolia street, Pine street and Front street are streets running across the city and over which appellants, or some of them, have been accustomed to pass in going from their homes to the business part of the city of Centralia, which is located west of the main

¹Reported in 120 Pac. 886.

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track of the Northern Pacific Railway Company. It is alleged in the complaint that the defendants, the officers of the city, are intending to pass an ordinance vacating a part of these streets, and that their purpose is to turn the vacated portions over to the railroad companies, which are made defendants herein, to be used for railroad purposes; that, if this design is accomplished, the streets will be closed to public travel; that no provision has been made for the payment of damages to these plaintiffs, and that the proposed action of the city authorities is void and unauthorized, and in contravention of the constitutional provision (art. 1, § 16), that private property shall not be taken or damaged without just compensation therefor. It is admitted that the several properties of the respective appellants do not abut or touch upon that part of the street actually vacated.

It is contended that appellants have a right to the use of the streets upon which their property abuts for its entire length, and are entitled to compensation as abutting owners, if any part of the street is vacated. Authority upon the particular proposition advanced is divided; but this court has, in several cases, aligned itself with the great majority of American courts in holding that a property owner does not come within the rule of compensation unless his property abuts upon or touches that part of the street which is actually vacated, or a special or peculiar damage is made to appear; or, to state the proposition in its elementary form, unless his injury differs in kind rather than in degree from that suffered by the general public. 15 Cyc. 665.

“The consideration of the question whether the abutting owner is specially and peculiarly damaged has resulted in a difference of opinion on the part of the courts, some courts being of the opinion that under certain circumstances the injury is special and peculiar, whilst other courts, under the same circumstances, have regarded it as only such as is sustained by the general public. The existence of the special and peculiar damage is, however, more readily recognized *when the property abuts* upon the particular part of the

street that is vacated. Many decisions declare that, as a general rule, only property abutting upon the portion of the street closed is specially damaged by the vacation, and that only such abutter can recover damages or compensation for the taking of his property." Dillon, *Municipal Corporations* (5th ed.), p. 1842, § 1160.

The exact question here raised was before this court in *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 Pac. 316. The court there said:

"There is some conflict of authority as to whether owners of lots not abutting upon that portion of a street actually vacated can recover damages. The current of authority seems to be against any such right of recovery, unless special damage is shown, as distinguished from that sustained by the public in general. 'Where a municipality attempts to vacate a street, property owners not abutting thereon have no grounds for objecting to the validity or regularity of the proceedings, nor the right to an injunction restraining such vacation.' 27 Am. & Eng. Ency. Law (2d ed.), 114, 115. . . . In *Heller v. Atchison etc. R. Co.*, 28 Kan. 625, Brewer, J., at page 628, said: 'Where a party owns a lot which abuts on that portion of the street vacated so that access to the lot is shut off, it is clear that the lot owner is directly injured, and may properly challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to the lot, suffers an injury which is not common to the public; but in the case at bar, access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is, that by the vacating of the street away from her lots the course of travel is changed. But this is only an indirect result. There is nothing to prevent travel from coming by her lots if travelers desire it. The way to the heart of the city by her lots is a little more remote than it was before, but still free passage is open to all who wish to pass thereby. No one is compelled to stay away. Access to the lots is the same that it was before, so that the injury is only the indirect result of the action complained of and it is an injury which, if it exists at all, is sustained by all other lots along the street west of the parts vacated.' "

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This case has been followed in several cases: *Mottman v. Olympia*, 45 Wash. 361, 88 Pac. 579; *Meacham v. Seattle*, 45 Wash. 380, 88 Pac. 628; *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797; and the principle recognized, without reference to these cases in *Murphy v. Chicago, Milwaukee etc. R. Co.*, 66 Wash. 663, 120 Pac. 525, and *Clute v. North Yakima & Valley R. Co.*, 62 Wash. 531, 114 Pac. 513.

The question of compensation for consequential damages was carefully considered in *In re Fifth Avenue etc.*, 62 Wash. 218, 113 Pac. 762, a street grade case, and it was there held that, to recover damages, the property affected must abut upon the improvement. Appellants quote the following from the *Smith* case:

“Where, however, the effect of closing the street or highway is to close the only passageway a property owner has from his property to the main public ways, such an owner may properly challenge the action by a suit in court, even though he be not an abutting property owner.”

But that case does not deny the authority of the former cases; it is expressly based upon them. It goes no further than to recognize the exception to the rule as stated in the *Ponichil* case; that is, that a recovery may be had if the vacation interferes with the *access* to the abutter's property in such manner that he is specially and peculiarly damaged. The injury must be physical in its character. *Smith v. St. Paul etc. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889. See, also, Dillon, Mun. Corp. (5th ed.), § 1160. But the rule is equally well settled that no compensation can be exacted where access is preserved over other streets or ways. In other words, an added inconvenience is not a damage or taking within the meaning of these terms as they are used in our state constitution. *Hall v. Lebanon*, 31 Ind. App. 265, 67 N. E. 703; *Mottman v. Olympia*, *supra*.

It is not seriously contended that the law is not settled against the appellants. The *Mottman* case is identical with the case at bar, but it is said that our “definition of an abut-

ting owner has been construed too narrowly." Appellants rely upon the following cases: *Alabama & V. R. Co. v. Turner* (Miss.), 52 South. 261; *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218, 63 N. E. 302, 92 Am. St. 305, 57 L. R. A. 508; *Chicago v. Baker*, 86 Fed. 753; *Borghart v. Cedar Rapids*, 126 Iowa 313, 101 N. W. 1120, 68 L. R. A. 306; *Laurel v. Rowell*, 84 Miss. 435, 36 South. 543; *Texarkana v. Leach*, 66 Ark. 40, 48 S. W. 807, 74 Am. St. 68.

The *Turner* case is especially relied on; and from expressions used in the opinion, it may be that the court would have been willing to hold on principle that a property owner has the use of a street for the whole length thereof, and from side to side, and that that use is such property that it cannot be taken without compensation. But it is more likely that its decision was really made to rest upon the statute, § 3336 of the Code of Mississippi. The power is there granted to municipalities "to close and vacate any street or alley or any portion thereof," and further, "that no street or alley, or any portion thereof, shall be closed or vacated except upon due compensation being first made to the *abutting land owners upon such street or alley* for all damages sustained thereby."

The other cases are in line with our own decisions, as qualified in *Smith v. Centralia*. In the *O'Brien* case, the obstruction was located about two hundred feet east of the plaintiff's residence. There was no cross-street or other outlet between the obstruction and plaintiff's property, so that his egress and ingress to and from his property were "wholly barred, cut off and destroyed." The distinction between the common right and the right of a private individual is pointed out, so that the case is in harmony with our present holding. In the *Baker* case, the court held that, in Illinois, damages would be allowed if there was a special injury, and that the property need not abut upon the vacation, but says further that: "The mere cutting off of travel along the street would seem to be a common injury for which individual relief is not allowed." In the *Borghart* case the property was abutting,

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access being wholly cut off. In *Laurel v. Rowell*, *supra*, the property was abutting. The *Texarkana* case holds that, in the absence of express legislative grant, a city cannot vacate streets. See, *Smith v. McDowell*, *infra*, and the discussion following.

It is most seriously contended that an injunction should issue because, by their demurrer, the defendants admit that they are "conspiring and confederating" together with intent to turn over the streets when vacated to a private use. It is a rule, sustained by universal authority, that courts will not inquire into the motives of a legislative body having power to act upon a given subject-matter. But granting that we had the right to do so, it does not follow that, because the property is to be put to purposes most convenient to the one acquiring title thereto, an injunction will issue. In the first place, having power to vacate, if the title in the street reverts to the abutting owner (*Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362), this court could not control or interfere with a lawful use of the property. Or, granting that the title does not revert but remains in the city, the mere fact that the result of a proper legislative act is to put the use of property in private control would not warrant interference by injunction.

"The vacated portion of the street had been laid over the Trumbull lands. There appears to have been an opportunity to sell a tract of said land to a company which would locate extensive works upon it, and so increase the prosperity of that portion of the city. The required piece of land could not have been obtained without a vacation of this part of York street. This was probably the principal inducement to the action of common council. But the motives which induce municipal proceedings of this kind are always of a mixed character. Regard for private interests are necessarily intertwined with public interests." *Kean v. Elizabeth*, 54 N. J. L. 462, 24 Atl. 495.

"The fact that, as a consequence of closing the street, private ownership in its bed results, and that provisions are made by the law by which the land can be utilized and ren-

dered valuable, does not convert the main purpose of the legislation from a public to a private one." *Matter of the Mayor*, 28 App. Div. 143, 52 N. Y. Supp. 588.

A like holding was made in the case of *Marshalltown v. Forney*, 61 Iowa 578:

"Now, if the vacation of a street puts an end to the public use, it certainly cannot affect the power of the city to vacate, that the vacation was made for the purpose of devoting the vacated street or alley to a private use. If the power to vacate is otherwise rightfully exercised, and no private rights are injuriously affected, it is not material what object is intended to be promoted by the vacation."

It will be borne in mind that this court has held that, unless the property of the owner actually abuts upon the vacated portion of the street or suffers a special injury, he has no private right. The case just cited was followed and approved in *Dempsey v. Burlington*, 66 Iowa 687, 24 N. W. 508. Another and perhaps stronger case than any of those cited is that of *Columbus v. Union Pac. R. Co.*, 137 Fed. 869, wherein it is said:

"It is urged, however, that the ordinance is void because it was not only a vacation, but a vacation and grant, or sale. We concur in the conclusion, reached by the circuit court, that the provision, 'There shall be and is hereby granted,' etc., 'to the railroad company that portion of the street vacated for depot purposes,' found in the ordinance, did not render the ordinance void. *Whitsett v. Union Depot Co.*, 10 Colo. 243, 15 Pac. 339. In that case, the court said: 'A municipal corporation is not warranted by law in exercising its power to vacate streets in an arbitrary manner and without regard to the interest and convenience of the public or of individual rights; but when the power to vacate exists, and has been exercised with due regard to the interest both of the public and of private rights, the fact that the vacating ordinance provides for the use which is to be made of the street, or portion thereof vacated, does not aid a property holder who seeks to annul the ordinance on the ground that he is interested in keeping the street open. The object to be accomplished in the present case may fairly be said to be one

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of great interest and convenience to the public. The establishment and construction of a union railroad depot for the use of all railroads entering within or centering in the city is a convenience, not only to all residents of the city, but to the public generally. We are, therefore, of opinion that the privileges granted to the Union Depot Company afford no ground for equitable interposition.' ”

No facts from which a “confederating or conspiring together” can be presumed are alleged, but it is evidently intended that the fact shall be inferred from the fact that the vacated portions of the street are to be used by the defendants railway companies for depot purposes. It may be enough, as we have already said, to say that the courts will not control the lawful use of property; but if the fact be that it is the intent of the city officers to vacate the street so that a depot may be erected thereon, it would not in itself be a fraud upon the right of any individual, or warrant injunctive relief. Depots and railroad facilities are in a sense semi-public improvements. 1 Am. & Eng. Ency. Law (2d ed.), 227. Practically the same question here presented was before the supreme court of Iowa, in *Spitzer v. Runyan*, 113 Iowa 619, 85 N. W. 782, where it was held that a vacation for the purpose of building a depot was valid, as “inspired by a desire to provide for the safety and convenience of the inhabitants of the city.”

We conceive the case of *Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102, to be directly in point. There the charge was that the ordinance was passed “without legal warrant or authority of law,” and was “a violation by the city of its duty as trustee.” It was held that such allegations were mere conclusions of law and not admitted by demurrer. It was further alleged that the council instigated, “by the city’s codefendant, a private corporation, passed an ordinance vacating for a distance of one block all that portion of Main or First street south of plaintiff’s premises; that the effect of the passage of said ordinance was to give defendant chemical works, the exclusive use of that portion

of the street so vacated; and that the latter company is still exercising such use, and has erected permanent obstructions thereon."

It was held that plaintiff, not being an immediate abutter, could not claim damages, and that although instigated by a private corporation so that it might use the property in the extension of its premises, the act of the council was not such a fraud as will authorize courts to invalidate the ordinance.

As against these authorities, appellants cite the case of *Smith v. McDowell ex rel. Hall*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393. The court in that case held that the power of the city to vacate a street was not absolute, to be exercised at the discretion of the municipal authorities. The decision was based upon a construction of a general statute (similar to §§ 7507, 7865, Rem. & Bal. Code) authorizing municipalities "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds and to vacate the same." With this case we have no quarrel, but it has no bearing on the instant case, for here the legislature has not only given a general power but has by express statute provided for the vacation of streets or any part thereof.

"Any person or body corporate in any city owning an interest in any real estate abutting upon any streets or alley who may desire to vacate such street or alley, or any part thereof may petition the city council of such city or town to make vacation, . . ." Rem. & Bal. Code, § 7840.

"When any street, alley or public way in any incorporated city or town in this state has heretofore been or may hereafter be vacated by the council or legislative body of said city or town, the property within the limits of any such street, alley or public way so vacated shall belong to the abutting property owners, . . ." Rem. & Bal. Code, § 7842.

We have reviewed and re-examined our former decisions, and many from other states, and are satisfied that they are

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correct in principle and sustained by the great weight of authority.

Judgment affirmed.

DUNBAR, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 9592. Department Two. February 7, 1912.]

THE STATE OF WASHINGTON, *on the Relation of R. S. Gladwin, Appellant*, v. THE CITY OF CHENEY *et al.*,
*Respondents.*¹

JUDGMENT—BAR—ESTOPPEL BY JUDGMENT—MATTERS THAT MIGHT HAVE BEEN LITIGATED. Where a holder of warrants brought a suit in equity setting out three warrants and alleging that he and others held other similar warrants, and that he brought the suit for the benefit of all to avoid a multiplicity of suits, seeking the affirmance of a principle upon which all of his warrants and others might be validated, and on appeal a decree established the validity of the three warrants in question, and remanded the case for the purposes of taking testimony to determine the validity of plaintiff's other warrants, opening the door of equity for plaintiff to establish the validity of all his warrants, whereupon he presented part of his warrants but withheld others, a final decree establishing the validity of the warrants presented by the plaintiff may be pleaded as an estoppel against a subsequent action prosecuted by plaintiff to establish other similar warrants held by him at the time but not presented in the first suit; since the same might have been litigated in the former action.

MUNICIPAL CORPORATIONS — WARRANTS — VALIDITY OF CONTRACT WITH OFFICER. Warrants issued under a contract made between the city and the president of a water company at a time when he was mayor of the city are voidable at common law, at the option of the city.

Appeal from a judgment of the superior court for Spokane county, Sullivan J., entered January 14, 1911, in favor of the defendants, upon quashing a writ of mandamus, after a trial to the court, dismissing an action for equitable relief. Affirmed.

¹Reported in 121 Pac. 48.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellant.

Happy, Winfree & Hindman, for respondents.

CHADWICK, J.—Relator brought this proceeding to establish the legality and compel the payment of certain warrants, issued by the city of Cheney between the years 1891 and 1895. Relief was denied below, and relator has appealed.

Two principal defenses are urged: (1) That of *res adjudicata*—or, to be exact, estoppel by judgment; and (2) that the warrants were issued under a contract made between the city and the Cheney Water & Land Company, of which D. C. Percival was president. Mr. Percival was also mayor of the city. It is said the warrants are therefore void under the statute; or, if it be held that the statute does not apply to the city of Cheney which was then operating under a special charter, that they are voidable under the common law rule. We find nothing in the record to indicate the ground upon which the trial judge based his judgment, but are of opinion that it can be sustained upon either of the defenses mentioned.

To discuss the plea of *res adjudicata*, it will be necessary to refer to previous litigation between these same parties. In the year 1899, relator brought this suit in equity in the superior court of Spokane county in which he alleged that he was the owner of three certain warrants, setting them up *in haec verba*, and prayed that they be established as valid obligations of the city and their payment enforced. In that complaint relator alleged that he was also the owner of other warrants, issued by said city of Cheney in accordance with its charter, amounting to more than \$5,000, all of which said warrants were issued between the 1st day of December, 1891, and the 1st day of January, 1895, a large number of said warrants having been issued during the year 1894. He then alleges that all of these warrants were presented to the city treasurer and payment refused because of no funds.

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He further alleged that the question to be determined in that action was one of common and general interest to many persons; that the parties so interested were numerous, and that it was impracticable to bring them all before the court, and that he brought his said action in his own behalf and in behalf of all persons having a similar interest in the matter in controversy. He prayed an order of the court enjoining the city from paying warrants subsequently issued out of a so-called "contingent fund," which had been created under a subsequent ordinance; and finally that the officers of the city desist and refrain from drawing or paying any warrant or warrants issued for general municipal purposes, no matter what fund might be named in said warrant, except in the order of their issuance, until the further order of the court. The case came on for trial before the Honorable Wm. E. Richardson, then judge of the superior court, and he held that the three warrants which had been set out in the complaint had been issued at a time when the city had exceeded its debt limit, and they were therefore void.

On appeal from this judgment, this court found the material question to be determined to be, "Were the warrants owned by appellant issued for necessary expenses in maintaining the existence of the municipality?" If so issued, they were valid; if not so issued, invalid. The three warrants were issued for officers' salaries, and their legality was established. *Hull v. Ames*, 26 Wash. 272, 66 Pac. 391, 90 Am. St. 743.

The court said:

"A number of warrants in suit owned by the appellants were found by the court to have been issued for that purpose. Those for services as policemen, marshal, and treasurer come within the requirement of necessities."

And further:

"The findings before us are not specific as to the purpose for which all the warrants for which payment is claimed by appellants were issued. The judgment is therefore reversed,

and the cause remanded, with directions to the superior court to find the nature of all obligations for which the warrants in suit were issued, and that those issued for necessary expenses in maintaining the existence of the municipality be adjudged valid, and that respondents be enjoined from payment from the funds in the city treasury, raised to pay indebtedness, of warrants or indebtedness issued subsequently to appellants' warrants so adjudged valid."

It will be seen that, if the court had in mind the establishment of three warrants and no more, its order on remand was without reason, for its decision ended the controversy as to them. It must have intended its judgment to be the establishment of a principle under which all of the warrants which the plaintiff said that he then held, and those held by others unknown to him and in whose behalf he maintained his suit, might be adjudged to be valid or invalid under the rule of municipal necessity, and paid in the order of their issuance. When the case came on for trial under the remittitur, relator presented other warrants, aggregating \$1,585, which were allowed by the court. Some of these warrants were issued in payment for street improvements, labor on the city jail, material for city jail, stove and fixtures for city jail, painting city jail, material for construction, labor, guarding quarantine patients, publication of notices, board of city prisoners, insurance, assessment roll, coal for city offices, recording book for city, cash expended by city clerk, book for city clerk, glass for city, expenses of making deed to lots for city, and city printing. On appeal, the city contended that these warrants, being issued for purposes other than officers' salaries, did not come within the rule of the former decision. But still adhering to the broad ground of governmental necessity, this court said:

"It is not believed that philanthropy or patriotism can be depended upon to supply, without cost, for any great length of time, either the services or the material necessary to the transaction of the business of the city; and the payment of such expenses is therefore necessary for the per-

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petuation of its corporate existence. The warrants in question all seem to be valid, under the rule announced in *Rauch v. Chapman, supra* [16 Wash. 568, 48 Pac. 253, 58 Am. St. 52, 36 L. R. A. 407].” *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189.

The final judgment in the former case was pronounced February 26, 1902. On February 24, 1908, this action was begun, and the plea of estoppel by judgment interposed. It is insisted that the court did not adjudicate beyond the three warrants described in the complaint; or, as said in the opinion, the “warrants in suit.” Upon the theory that a separate action could be maintained for each warrant (and of this we have no doubt), this might be true; but relator did not bring an action at law or a special proceeding directed to a recovery upon specific warrants. He came into equity exhibiting three warrants, to show the character of the obligations held by him and by others, and of which he said he had other warrants amounting to more than \$5,000. It will be seen that his suit can only be sustained upon the theory that he was seeking the affirmance of a principle upon which all of his warrants and all of a similar character might be validated and paid in their order, rather than a recovery upon the three warrants described in his pleadings. Accordingly, when the door of a court of equity had been opened at his request, he might have offered every warrant then in his possession for its inspection and judgment. He offered a part and reserved a part, and after a term of years has brought this proceeding at law to establish warrants the ownership of which he had pleaded in the former proceeding and which he should have then submitted to the court.

Relator relies upon *Nesbit v. Riverside Independent District*, 144 U. S. 610, and *Cromwell v. County of Sac*, 94 U. S. 351. These cases go no further than to hold that a party who brings an action upon one or more coupons, or a bond of a series, is not estopped to bring an action upon others which he might have included. In other words, as a rule a

judgment will only operate to bar a recovery upon what was the subject-matter of the former suit.

"The rule is that, in an action between the same parties, a judgment therein is *res adjudicata* as to all points in issue, and also all points which might have been raised and adjudicated." *Olson v. Title Trust Company*, 58 Wash. 599, 109 Pac. 49.

See, also, *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427. There will be no disharmony in the application of these rules, if we bear in mind that the words, "might have been raised and adjudicated," are construed with particular reference to the subject of the inquiry. They do not mean merely that a party had an opportunity to submit the "point" as a separate cause of action, for it has never been held that separate and divisible claims could not be made the subject of independent suits. But they mean rather that, when the court has jurisdiction of a whole subject-matter, a duty rests upon the litigant to so conduct his case as to bring the controversy to a final termination. So here, plaintiff invited and obtained the establishment of a rule which applied to all the warrants held by him, and under it the order of their payment might have been adjudged by the court. The court was open to hear and determine, and having waived his opportunity, relator should now be held to the rule of estoppel by judgment.

"Appellant had his day in court, and cannot be heard further. While it is our boast that the courts of our country are always open, it does not follow that they are open always. There must be an end of litigation over a given subject-matter." *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. 1084.

"A party therefore must present in one action all the reasons, grounds, and evidence which he may have in support of his claim or defense, and if he has several claims or titles to the property in controversy he must assert them all. Again if a party is brought into a case and has a fair legal opportunity to present and enforce any claim he may have in relation to the subject-matter he must avail himself of it, and

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whether an original party or an intervener, he must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or defense." 23 Cyc. p. 1170.

When plaintiff invited the interposition of a court of equity, he properly made a full disclosure of his relation to the city; and the application of the principle which we have just announced is but a restatement of the old rule that, when equity has assumed jurisdiction for any purpose, it extends to the whole controversy, so that a multiplicity of suits may be avoided.

We are also of opinion that the warrants, if otherwise legal, are voidable because of the fact that they were issued under a contract made between the president of the water company and the city at a time when that officer was the mayor of the city. It seems that, under Ordinance No. 93, the city of Cheney had directed its officers to enter into a contract with one Frederick Carroll, to whom it had given a franchise to lay water pipes under and through the streets of the city of Cheney. This contract expired by limitation on September 1, 1890. On the 21st day of August, 1890, another Ordinance was passed—No. 125—in which it was recited that Carroll had disposed of his franchise rights to the Cheney Land & Water Company, and the officers of the city were authorized to enter into a contract with that company. It is earnestly contended that, inasmuch as Ordinance No. 125 does not materially differ from Ordinance No. 93, the contract is referable to the first rather than to the second ordinance, and therefore valid. We cannot so hold. Ordinance No. 125 is complete in itself and covers the whole subject-matter of the contract. It was passed in lieu of Ordinance No. 93 (which was expressly repealed), at a time when it was evident that Carroll's privilege would expire by limitation and without performance. It is unnecessary for us to hold the contract to be void under § 7702, Rem. & Bal. Code, as construed in *Northport v. Northport Townsite Co.*,

27 Wash. 543, 68 Pac. 204; *Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765; and *Shaw & Hodgins v. Waldron*, 55 Wash. 271, 104 Pac. 272, 28 L. R. A. (N. S.) 735, for it is doubtful whether the statute should be held to apply to a city operating under an independent charter. But in any event, the city having raised this defense, the common law rule that such contracts are voidable (Dillon, *Mun. Corp.*, 5th ed., 773) must be held to apply.

This disposition of the case makes it unnecessary to notice other defenses urged by the city. Judgment affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9635. Department Two. February 7, 1912.]

H. H. BURNS *et al.*, Respondents, v. EDMUND DUFRESNE
et al., Appellants.¹

LANDLORD AND TENANT—LEASE—COVENANTS—CONDITIONS—SUBLETTING. Under a lease of a space to be used as a theater entrance, covenanting that the same shall not be *assigned* without the written consent of the lessor, and providing that the portion of the premises not required for such purpose may be used by the lessee for any lawful purpose, the lessee may sublet such portions without the consent of the lessor; conditions against assignment and subletting being strictly construed.

SAME — LEASE — CONSTRUCTION — AUTHORITY FOR ALTERATIONS IN PREMISES. Where a lease of ground floor to be used for a theater entrance provided that the lessee may at his own expense install heat, water, and light by such piping and wiring as may be necessary, the lessee is authorized to bore holes in the floor and connect with water pipes by way of an unoccupied basement, although the basement was expressly reserved to the lessor, where it appears that there was no other way to make the connections, which did not in any way interfere with the lessor's reasonable use of the basement.

LANDLORD AND TENANT — SUBLETTING — PURPOSES — REMEDIES — INJUNCTION — WHEN LIES. An injunction will not be granted at the suit of the owner against a sublease for the purpose of maintaining

¹Reported in 121 Pac. 46.

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a cigar store and saloon, on the theory that no saloon license can be granted without the owner's consent under Rem. & Bal. Code, § 6290, where the lease contained no restrictions; since plaintiff can withhold his consent and prevent the issuance of the saloon license, and the sublessee is entitled to conduct any other lawful business on the premises.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered March 3, 1911, upon findings in favor of the plaintiffs, after a trial to the court, in an action for an injunction and damages to leased premises. Reversed.

Wakefield & Witherspoon (A. C. Shaw and E. P. Twohy, of counsel), for appellants.

Del Cary Smith, for respondents.

CROW, J.—Upon November 1, 1909, the plaintiffs, H. H. Burns and J. N. Thennes, owners of a building on the corner of Post street and Front avenue, in the city of Spokane, leased two storerooms on the ground floor to Shubert Theater Company, a corporation, for five years. At that time, the lessee was erecting a theater building on the south side of Front avenue, immediately to the rear of, and adjacent to, the east line of, plaintiffs' building. The purpose of the lease was to provide a Post street entrance to the theater. The trial court properly found that, with plaintiffs' consent, the lease was assigned by the Shubert Theater Company to the defendant American Building Company, a corporation. The leased rooms had a frontage of forty-five and one-half feet on Post street, and extended easterly to the west line of the theater building. The lessee was authorized to construct, at its own expense, a theater entrance of such width as it desired. For such purpose, it was permitted to change or move a partition between the two storerooms and construct other partitions on either side of the entrance. It was also authorized to use and occupy, for any lawful purpose, that portion of the leased area not used for the theater entrance.

Other provisions of the lease will be hereinafter mentioned. The American Building Company constructed a theater entrance eleven feet in width, separated by partitions from storerooms located on either side thereof within the leased area. When these rooms were ready for occupancy, the American Building Company as lessee sublet the south room to the defendant Edmund Dufresne, who intended to use the same for a cigar store and saloon. To make connections with the city water mains and sewer, Dufresne cut a few holes through the storeroom floor. Thereupon this action was commenced by plaintiffs, the original lessors, to enjoin the lessee from subletting to Dufresne, to enjoin him from cutting through the floors, or connecting with the city water mains and sewer, and to recover damages for changes already made. A restraining order was granted which, after a hearing upon the merits, was made permanent by the final decree. Plaintiffs were also awarded judgment for \$10 damages and their costs. The defendants have appealed.

Respondents' principal contention is that the lessee had no power or authority to sublet the south room to Dufresne without their written consent, which was not granted. The clause upon which this contention is predicated reads as follows:

"The said party of the second part [the lessee] further covenants and agrees not to assign this lease nor to permit any other persons to improve the same or make or suffer any alterations therein except as herein stated, unless the written permission of the said parties of the first part shall have first been obtained in writing."

This is a covenant that the lease itself shall not be assigned, no reference to a subletting being made. The lease also provided that:

"It is further expressly understood and agreed that the said premises hereby demised are to be used by the said lessee, its successors and assigns, for a theater entrance to the theater in the rear of said premises, and that so much of said premises as may not be necessary or devoted to a theater

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entrance hereinafter referred to may be used by said party of the second part for any lawful purpose."

This stipulation seems to contemplate a subletting for any lawful purpose, of that portion of the leasehold not converted into a theater entrance. The authorities are numerous to the effect that stipulations against an assignment of a lease, or against a subletting, are to be strictly construed. Discussing covenants not to assign or underlet, Taylor, in the ninth edition of his work on Landlord and Tenant, at § 408, says:

"Covenants of this description are construed by courts of law with the utmost strictness, to prevent the restraint from going beyond the express stipulation. If, therefore, the lessee covenants 'not to assign, transfer, set over,' or otherwise do, or put away the lease or premises, this does not prevent him from underletting. Nor will a covenant 'not to let or underlet the whole or any part' of the demised premises preclude an assignment of the whole interest."

Tiffany, in his work on Landlord and Tenant, at pages 921-2, says:

"Restrictions of this character, upon alienation by the lessee, are not favored and are, it is said, to be construed strictly, and a particular mode of alienation is, it has been stated in a leading case on the subject, not to be regarded as prohibited unless it is 'by words which admit of no other meaning.' Accordingly, a covenant or condition not to assign is not broken by the making of a sublease, and, in spite of a *dictum* to the contrary, the weight both of reason and authority is to the effect that a covenant not to sublet is not broken by an assignment."

A marked and well-recognized distinction exists between a covenant against an assignment of the entire lease, and a covenant against the subletting of a portion of the premises. An expressed covenant against the one privilege will not restrain the lessee from enjoying or exercising the other. Taking into consideration the two clauses above quoted, we conclude the lessee was entitled to sublet the south storeroom

without the lessors' consent. *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53; *Cuschner v. Westlake*, 43 Wash. 690, 86 Pac. 148.

The lease, however, in express terms provides that:

"It is expressly understood and agreed by and between the parties hereto that the only portion of said building included in this lease is the first floor thereof as herein described so far as the same is embraced and included in the rooms known as No. 226 and 228, Post street, and extending east and west through said building, and that this lease does not include the basement below said first floor or any part of said building adjoining or above the part so rented."

It was alleged by respondents and shown by the evidence, that the appellant Dufresne, as sublessee, was installing water and sewer connections, and that in so doing he had bored a few holes through the floor of the south storeroom so that he might pass connecting pipes through the basement to the city mains. It is not contended, nor was it shown, that he could make the connections in any other manner. The lease authorized the lessee to make such changes within the area leased as might be necessary to construct the theater entrance, and in so doing to make changes in partitions on the first floor. It also provided:

"It is further understood and agreed by and between the parties hereto that the said party of the second part [the lessee] shall at its own expense furnish all the light, heat and water which it may use upon the premises hereby demised, and the said party of the second part hereby promises, covenants and agrees that in the installation of said light, heat and water such piping and wiring, or other work as may be necessary for such installation shall not interfere in any way with the balance of said building of the said parties of the first part, and not included in this lease, or with any other tenants in the said building."

Respondents contend that this stipulation prohibited the lessee from passing pipes through the basement to the water mains and sewer. There appears to have been no other way in which to make the connections and obtain the service.

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The basement was unoccupied, and it was shown that the proposed connections would not interfere with any reasonable use to which it could be devoted. The lease expressly provides that the lessee shall obtain such service at its own expense. If connections are not to be made through the basement, they could not be made at all, and the lease would be inconsistent, as by one stipulation it would deprive the lessee of the enjoyment of rights expressly granted by another. It is a well-recognized principle in the law of landlord and tenant, that the lease of a portion of a building carries with it as incidental thereto everything necessary to the reasonable use and enjoyment of the lease, and we are constrained to hold that the lessee did have the right to make reasonable water and sewer connections through the basement, that being the only manner in which they could be made.

Respondents, citing Rem. & Bal. Code, § 6290, insist that Dufresne could not lawfully conduct a saloon business in the south storeroom without first obtaining a license; that no such license could be obtained without respondents' written consent as owners, and that respondents are therefore entitled to an injunction to prevent the subletting. Respondents could have inserted a stipulation in the lease, prohibiting any saloon on the premises, but did not do so. If, as they contend, they can now prevent that business by refusing their written consent to the issuance of a license, they are at liberty to do so, and it is not necessary for them to come into a court of equity and enjoin a subletting to the appellant Dufresne. He intends to conduct a cigar store as well as a saloon. If the latter cannot be permitted, for want of a license, he would nevertheless be entitled to his sublease, so that at his election he might use the storeroom for the cigar business alone, or any other lawful business. Respondents contend that he cannot conduct a saloon without their written consent to a license. Conceding this to be true, he could conduct any other lawful business under his

sublease without their consent. We find no equities in this case entitling respondents to an injunction, nor do we think they are entitled to damages for necessary work done in preparing to make connections with the water mains and sewer.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

DUNBAR, C. J., CHADWICK, MORRIS, and ELLIS, JJ., concur.

[No. 9807. Department One. February 7, 1912.]

MARGARET BLAIR PARR *et al.*, *Respondents*, v. THE CITY OF SPOKANE, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—EVIDENCE—SUFFICIENCY. Negligence in lowering a heavy bucket, containing three tons of concrete, into the forms for a bridge pier, while the bucket was swinging, whereby it broke the forms and caused the death of an employee at the base of the pier, is a question for the jury, where the city engineer testified that a swinging bucket should be stopped by the signalman before it entered the forms, which was not done, and a witness testified that the bucket had a swing of 10 or 12 feet; and it is immaterial that no witness testified as to what caused the swinging, or how it could be stopped; the inference from natural laws being sufficient.

MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE—NEGLIGENCE OF SIGNALMAN—FELLOW SERVANTS. A servant working by order of the foreman at the base of a bridge pier while the forms were being filled with concrete, may assume the safety of the place, and does not assume the risk of negligence of the signalman whereby a bucket of concrete broke the forms; as the signalman is not a fellow servant but a vice principal performing a nondelegable duty of the master.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 19, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death of a city employee. Affirmed.

¹Reported in 121 Pac. 453.

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Opinion Per Gose, J.

Cannon, Ferris, Swan & Lally (A. M. Craven, of counsel),
for appellant.

Dewart & Fouts, for respondents.

Gose, J.—The plaintiffs, the widow and minor children of George Wesley Parr, deceased, brought this action to recover damages arising from his death, alleging that he lost his life in consequence of the defendant's negligence, while in its employ. There was a verdict and judgment for the plaintiffs. The defendant has appealed.

The appellant, at the time of the happening of the accident, was engaged in the construction of a concrete bridge across the Spokane river, at Monroe street. The plan adopted required the erection of high concrete piers. The piers on the south side of the river had been built up to a height of about forty-seven feet. In carrying on the work, the concrete was placed in wooden forms. These forms were six to eight feet in height, eight feet in width, and about seventeen feet in length, and rested on the top of the piers. They were made of heavy timbers, set transversely, to which were nailed or spiked smaller timbers, placed vertically, and to these were nailed light boards or planks, thus forming a box-shaped receptacle open at both ends. The larger timbers were held together by rods, passing from side to side and fastened by nuts and washers. The concrete was emptied into the forms and put in place by men within. After the concrete had hardened, the forms were removed. The concrete was mixed on the north side of the river, where it was emptied into buckets weighing about three tons when filled. These buckets were then elevated to an overhead cable, and carried to a point directly above the forms, by means of a traveler running upon the cable, the power being supplied by an engine on the north side of the river. The cable was about one hundred feet above the forms, and attached at either end to a tower. The bucket was attached to the traveler by a cable running through a block and tackle and

was controlled by the engine. A signalman stood upon a platform between the piers at the south side of the river, which was so elevated that he could see into the forms. The signals were given by means of a telephone. When the bucket reached a point immediately above the forms, he gave a signal to the engineer to stop the traveler, and then gave him a second signal to lower the bucket into the forms. A short time before the accident, the deceased had been directed by one of the foremen to remove certain wooden braces at the base of the east pier, and was engaged thereat when he was killed. His death was caused in this manner: The signalman gave the signal to lower the bucket and it was lowered into the form while swinging, thus causing it to strike the end of the form, breaking it loose and precipitating it upon the deceased, causing his death.

At the close of the respondents' evidence, the appellant moved for a nonsuit and, after all the evidence was submitted, it moved for a directed verdict. After return of the verdict, it moved for a judgment notwithstanding the verdict. The denial of these motions raises the first and principal question presented by the appeal. The appellant contends that there is no evidence of negligence. On the other hand, the respondents' position is that the jury was warranted in finding that it was negligence to lower the bucket into the form while it was swinging. The evidence touching this question is as follows: A Mr. Beardsley, the foreman for the appellant in the construction of the forms, was introduced as a witness by the respondents, and asked what caused the form to fall. He answered: "The bucket struck it and knocked it down." He was then asked: "Was that bucket controlled by signals?" and answered: "Yes, sir. He controlled it as far as he could, and the bucket came down swinging and knocked it down." Mr. McCartney, the city engineer and superintendent in charge of the work, testified in behalf of the appellant that the signalman stood upon a platform between the two south piers so that he could see into

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the forms; that when the bucket reached the desired position, he gave the engineer a signal to stop the carriage, and that, when this signal had been obeyed, he gave a signal to lower the bucket into the form. He was then asked what the result would be if the bucket was swinging when it reached a point near the form, and answered: "In that case the signalman would give the signal for the bucket to stop, and that bucket most always would swing when it would reach that point, and the signalman would give his signal to stop it." The next question propounded was: "That is, the engineer would stop his engine?" The answer was: "The engineer would stop his engine, yes. In this case the bucket wasn't stopped until it got inside the form." Another witness introduced by the appellant was asked the question whether there was any way to keep the bucket from swinging, and answered: "Not that I know of." This witness also stated that the bucket had a swing of approximately ten or twelve feet, but that he could not estimate it "within four or five feet."

It seems clear to us from this testimony that the jury had abundant warrant for finding the appellant guilty of negligence. The reasonable interpretation of the testimony of the superintendent is that the failure of the signalman to give a stop signal before the bucket reached the form was the proximate cause of the death of the deceased. It must have been apparent to him that, with the swing which the bucket had developed, it would strike the form if lowered into it at that time. He knew the approximate weight of the bucket, and it was his plain duty to stop it until its motion had been sufficiently arrested to make it reasonably safe to lower it into the form. The appellant does not meet the issue by saying that it does not know what caused the bucket to develop so wide a swing at the time in question, and that it does not know how its motion could have been arrested. It cannot plead ignorance of simple natural laws. Common observation and experience teach that the sweep

would have grown gradually less if the bucket had been stopped above the form. The signalman was representing the master, and the question whether he used reasonable care was, to our minds, one for the jury to determine. The fact that no witness testified to either the precise cause of the swing of the bucket, or to how its swing could have been lessened or arrested before it entered the form, is not controlling upon the jury. No rule of law is better established than that any inference which may reasonably be drawn from proven or admitted facts is just as competent evidence as the facts themselves, and may be considered by the court and the jury in determining where the truth lies. This view is well stated by Justice Dunbar, in *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357, where he said:

“But it must be borne in mind that it is not sufficient to justify the court in taking the case from the jury that the facts be undisputed, but it must also appear that there is no room for a difference of opinion as to the inferences and conclusions to be drawn from admitted facts.”

In *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820, the court quoted with approval from vol. 2, Thompson on Negligence, page 1236, as follows:

“It is frequently stated that, when the facts are undisputed or conclusively proved, the question of negligence is to be decided by the court. A better opinion, however, would seem to be that, in order to justify the withdrawal of the case from the jury, the facts of the case should not be undisputed, but the conclusion to be drawn from those facts indisputable. Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury.”

See, also, *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1088. That the question of the appellant's negligence was for the jury to determine finds support in the following cases: *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A. (N. S.) 367; *Campbell v. Jones*, *supra*; *Grosjean v. Denny-Renton Clay & Coal Co.*, 62 Wash. 196, 113 Pac. 570;

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McLeod v. Chicago, Milwaukee etc. R. Co., 65 Wash. 62, 117 Pac. 749.

The appellant relies upon *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364, and kindred cases from this and other courts. In that case, the plaintiff lost an eye in consequence of steel filings getting into the eye while sawing steel lugs. He admitted that he knew that the fine dust produced by the sawing of the lugs had theretofore gotten into the eyes of other employees, and that it caused an inflammation of the eye. His contention was that he did not know that it might result in a loss of an eye. A recovery was denied, upon the ground that it was one of that class of accidents which are so rare, unexpected, and unforeseen that the master, in the exercise of reasonable care, could not be held to have anticipated it.

The appellant pleaded affirmatively, (1) that the deceased assumed the risk, and (2) that the negligence which caused his death, if there was any negligence, was that of a fellow servant "in the manner of lowering the bucket." The court instructed the jury to disregard these defenses. This is assigned as error. In considering the question of assumption of risk, it is to be remembered that the deceased was working at the base of the pier, where he had been directed by the foreman to work about an hour before he lost his life. The order was an implied assurance that the place was safe. As was said in *Cox v. Wilkeson Coal & Coke Co.*, 61 Wash. 343, 112 Pac. 231:

"He had been called by one in authority over him, and told the place was safe. It was his duty to obey the call, and in so doing he could rely upon the safety of the place to which he was called."

It is well settled that he did not assume the risk of the master's negligence. *Anustasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Bailey v. Mukilteo Lum-*

ber Co., 44 Wash. 581, 87 Pac. 819. Nor did the fellow-servant rule apply to him. He and the signalman were working for a common master, but were not engaged in a common employment. The deceased was not so situated that he could take precautions against the negligence of the signalman. Moreover, as we have stated, the signalman was performing the work of the master and was a vice principal. We think a mere reference to the facts demonstrates the soundness of this view. *Jacobsen v. Rothschild*, 62 Wash. 127, 113 Pac. 261; *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.), 481; *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *Grosjean v. Denny-Renton Clay & Coal Co.*, *supra*; *Martin v. Hill*, 66 Wash. 433, 119 Pac. 849.

The court instructed the jury as follows:

“Where in carrying on work it is necessary that some of the work be directed by signals the signalman designated by the master occupied the position of the master so far as the giving of the signals was concerned, and his wrong signal or failure to signal is the wrong signal or failure of the master.”

Error is assigned to this instruction. What we have already said disposes of this question. The other instructions given by the court were within the issues and correctly stated the law of the case.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

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Opinion Per MORRIS, J.

[No. 9943. Department Two. February 8, 1912.]

PETER FRONHOFER, *Respondent*, v. INLAND NAVIGATION
COMPANY *et al.*, *Appellants*.¹

APPEAL—REVIEW—VERDICT. A verdict will not be disturbed on appeal where the evidence is conflicting and sufficient to sustain a finding either way.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,410, reduced by the trial court to \$910, for a severe and painful knife cut in the thigh, received in an assault, will not be disturbed on appeal as excessive.

CARRIERS—INJURIES—OWNERSHIP OF VESSEL—QUESTION—SUFFICIENCY. A navigation company selling a ticket for passage on a boat, is not liable for an assault by a deckhand on the boat, where there was no evidence that it owned or operated the boat.

Appeal from a judgment of the superior court for King county, Prigmore, J., entered June 16, 1911, upon the verdict of a jury rendered in favor of the plaintiff, for damages for an assault on a passenger on a boat. Reversed in part and affirmed in part.

Ira Bronson, for appellants.

Vince H. Faben, for respondent.

MORRIS, J.—Action to recover damages for personal injuries. Respondent alleged that, on June 26, 1910, while he was a passenger upon the steamer Tourist, on the run from Pleasant Beach to Seattle, he was assaulted by a deckhand, and received a severe and painful knife cut in his left thigh. Issue being joined, the evidence was submitted to a jury, and a verdict of \$1,410 returned. Upon appellants' motion for a new trial, the court below reduced the verdict to \$910, and entered judgment, from which appeal is taken.

¹Reported in 121 Pac. 45.

The errors here urged are insufficiency of the evidence to justify the verdict; that the verdict is still excessive; and that the motion of the Inland Navigation Company for its dismissal should have been granted. The evidence is greatly conflicting as to the part played by respondent in what appears to have been a free-for-all fight on board the steamer. Respondent and his witnesses say he was a mere spectator, taking no part in the disturbance, and that while standing quietly in one of the passageways he was, without provocation, cut by one of the deckhands. Appellants' witnesses make him a leader in the drunken brawl, and confine the fighting to the passengers, with no member of the crew participating, except in the lawful effort to quell the disturbance. The evidence was such that it would support a verdict upon either theory, and under such circumstances there is no reason why we should consider disturbing the verdict. If the jury believed it, the evidence was ample to support the verdict, and it must stand.

The trial judge, upon appellants' contention that it was excessive, reduced the verdict from \$1,410, to \$910. We are not prepared to say that a further reduction should now be made. The amount is ample for the injuries disclosed by the evidence, but we cannot say it is too much, and to that extent override both the judgment of the jury and that of the trial judge.

The next contention of appellants should be sustained. The only evidence as to the ownership and operation of the steamer Tourist on the day of the assault eliminates the Inland Navigation Company. There is some evidence that this company issued the ticket upon which respondent took passage. His cause of action, however, is one in tort, and will lie only against those in fact and in law answerable for that tort. The evidence does not disclose that this company is so answerable, and its motion to dismiss should have been granted.

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Opinion Per MOUNT, J.

The judgment is reversed as to the Inland Navigation Company, and the cause remanded with instructions to dismiss as to it. In all other respects, it is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 10026. Department Two. February 8, 1912.]

JAMES W. NOLAN, *Appellant*, v. PACIFIC WAREHOUSE
COMPANY, *Respondent*.¹

TRIAL—RIGHT TO JURY TRIAL—LEGAL ACTION AND EQUITABLE CROSS-COMPLAINT. The plaintiff is not entitled to a jury trial on issues raised by a complaint in an action to recover damages for breach of a contract, where the defendant, admitting the contract, denied the breach and filed a cross-complaint alleging plaintiff's breach and praying the foreclosure of a trust deed given by plaintiff as security for his performance, since the answer and cross-complaint converted the case into an equitable action.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 10, 1911, upon findings in favor of the defendant, after a trial to the court, in an action on contract. Affirmed.

John E. Humphries, for appellant.

Preston & Thorgrimson, for respondent.

MOUNT, J.—Plaintiff brought this action to recover damages on account of an alleged breach of a written contract by the defendant. The defendant answered, admitting the contract as set out in the complaint, but denied any breach thereof on its part; and for a cross-complaint alleged, that the plaintiff had executed a certain deed of real property as security for the faithful performance of the contract; that plaintiff had failed to perform the contract; that defendant had completed the same, and in order to do so, had expended \$469; and prayed that the trust property be sold

¹Reported in 121 Pac. 451.

in order to reimburse the defendant for such expenses. Plaintiff denied these allegations. When the case came on for trial, the plaintiff demanded a jury, which the court denied. The cause was then tried to the court, and resulted in a judgment for \$66.85 in favor of the defendant, and a decree directing the sale of the real estate given as security for the faithful performance of the contract. The plaintiff appeals.

He makes but one contention here, which is that the court erred in refusing his demand for a jury trial. He contends that, under the constitution and statutes, he is entitled to a jury trial in this case because the complaint is for damages for the breach of a written contract, and the only defense is the denial of this breach. The answer, however, in addition to a general denial of a breach of the contract by the defendant, alleges a breach by the plaintiff, and asks for the foreclosure of a trust deed given as security for such breach. In the case of *Lindley v. McGlaulin*, 57 Wash. 581, 107 Pac. 355, considering the question here presented, we said, at page 581:

“The appellant insists, further, that the question whether the action is of legal or equitable cognizance must be determined from the complaint alone, not from the pleadings in their entirety, and urges that the complaint in the present case shows a legal and not an equitable cause of action. But a defendant under the code may set forth by answer as many defenses as he may have, ‘whether they be such as have heretofore been denominated legal or equitable, or both.’ In other words, a purely equitable defense may be set forth to a purely legal action; and, since it may be set forth, it may be tried as an equitable action. *Peterson v. Philadelphia Mtg. & Trust Co.*, 33 Wash. 464, 74 Pac. 585. It follows from this, we think, that the nature of the trial is determined from the entire pleadings, rather than from the complaint alone.”

The case of *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S. W. 1007, is in point here. That was a case where the plaintiff sued to collect rent under a written lease. The defendant, for answer, set up one of the provisions of the lease which it was alleged plaintiff had violated, and prayed for a

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cancellation of the lease. A demand for a jury was denied. On appeal, the plaintiff contended that the effect of such defense was to require the court to hear the equitable defense first and then proceed with the case at law. The court there said:

“The infirmity underlying this position is that the answer does not simply interpose an equitable defense, but it is a cross-bill in equity, asking affirmative relief, which, if granted, as it was, would cut out the foundations upon which the plaintiffs’ right to recover depended, and therefore destroyed the plaintiffs’ case. This accentuates the difference between a mere equitable defense and a cross-bill in equity asking affirmative relief, which, if granted, destroys the plaintiffs’ case. This being true, the answer and cross-bill converted this case into one in equity, and a trial by jury was properly denied.”

The same is true here. If it was the duty of the court to try the equitable defense first, when he found that the plaintiff had breached the contract, this destroyed the plaintiff’s case. There was no dispute in the evidence that the plaintiff did not complete his contract within the time he had agreed to do so. His excuse for not doing so was wholly untenable.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, FULLERTON, and ELLIS, JJ., concur.

[No. 10060. Department Two. February 8, 1912.]

F. H. FISHER, *Respondent*, v. STONE & WEBSTER
ENGINEERING CORPORATION *et al.*, *Appellants*.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS—EVIDENCE—SUFFICIENCY. The risk of being struck by the butt of a falling tree is obvious and necessarily incident to the work of slashing trees and brush and is assumed by a man, thirty-four years of age, of ordinary understanding and experience, although he had had no previous experience in that work and was not warned of the danger.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered August 9, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in falling a tree. Reversed.

Farrell, Kane & Stratton, for appellants.

E. H. Guie, for respondent.

MOUNT, J.—The plaintiff recovered a judgment for personal injuries. The defendants have appealed.

It appears that, during the summer of 1909, the defendants were engaged in clearing the brush and timber from a right of way for an electric railway. The defendant A. Spotts was the foreman of the engineering company in charge of the work. The plaintiff had been in the employ of the defendants for several months. In the month of September of that year, he was set to work with a number of other men at slashing and burning brush and small trees upon the right of way. He had previously had no experience in this class of work. On September 9 in the morning, after he had been engaged in slashing brush and trees for two or three days, he felled a tree, about sixteen inches in diameter at the base, into the right of way. Mr. Spotts, who happened to be present at that time, directed the plain-

¹Reported in 120 Pac. 44.

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tiff to fall such trees so that they would go out of the right of way. In the afternoon, while Mr. Spotts was not present, the plaintiff chopped down a tree about ten or twelve inches in diameter at the base and about sixty feet in height. This tree leaned toward the right of way. Plaintiff chopped the tree so that it would fall out of the right of way. As the tree fell it struck upon brush or trees standing at the edge of the right of way so as to cause the butt of the falling tree to "kick back." As the tree did so, it caught the plaintiff's leg and injured him. The negligence alleged was that,

"The defendant directed and caused the plaintiff to fall the said tree into the woods along said right of way, instead of allowing such tree to be felled into the right of way, said right of way being cleared and free from other trees and obstructions at said point; that the natural slant of said tree was, when cut, to fall into the said right of way, which was the only safe and natural place to fall such tree; that plaintiff obeyed the instructions of defendant's foreman, the said A. Spotts, and cut said tree down so that the same fell into the woods when cut and struck another tree, and the end of the tree cut by plaintiff fell back and struck plaintiff."

We are satisfied that the trial court should have dismissed the case upon the defendants' motion for a directed verdict, made both at the close of the plaintiff's evidence and again at the close of the case. While it was shown that the plaintiff was inexperienced in slashing brush and trees, prior to the time he began such work, two or three days prior to his injury, he was shown to be a man thirty-four years of age, and at least of ordinary understanding. In fact, he had been engaged for several years in occupations requiring skill and judgment. It is apparent that he knew how to fall trees, for he caused this particular tree to fall away from the way it was inclined. If defendants were negligent in directing the plaintiff to fall the tree outside of the right of way, such negligence was not the cause of the plaintiff's injury. The fact that trees were negligently or wilfully thrown upon property where they did not belong might be

cause for complaint by the owners of such property, but defendants would not incur liability to their servants by reason thereof. If there was any negligence in the case, it consisted in the failure of the defendants to warn the servant of dangers which the master knew, or should have known, and the servant did not know and by ordinary care could not discover. Assuming that the complaint charged such negligence in this case—for that seems to be now the theory of the plaintiff, because many cases are cited which are based upon that rule—it seems clear that the danger of falling trees either into or without the right of way was as open and apparent to the plaintiff as it was to the master, and therefore does not fall within the rule contended for. The foreman was not present when the tree was cut. He had previously directed the plaintiff to fall the tree out of the right of way. The plaintiff undertook to do so without further direction, and did so successfully, although the tree leaned toward the right of way. The plaintiff probably knew where the tree was going to fall, by the way he cut it. He no doubt could see, after it started to fall, where it was going and what trees and brush it would encounter in its fall.

This case cannot be distinguished from the case of *Anderson v. Columbia Imp. Co.*, 41 Wash. 83, 82 Pac. 1037, 2 L. R. A. (N. S.) 840. In that case we said:

“He [the plaintiff] must have known that, when he cut down a tree one hundred and thirty feet long and one foot in diameter at the base, it might fall upon him, and that such tree was liable to break limbs in its descent against other trees standing near by, and that those limbs would injure him if he stood under them. Under such surroundings, he must appreciate the dangers without being specially informed thereof. 4 Thompson, Commentaries on Law of Negligence, § 4061. Such dangers are necessarily incident to his employment. They are open and obvious to ordinary inspection. They are made by the progress of the work, and the master is not required to stand by and inform him of things which he may see by merely glancing, or using only ordinary

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care for his own safety. The injury in this case clearly resulted from one of the ordinary risks of the employment. He therefore assumed the risk, and the master is not liable."

What was said there is equally applicable here, because the cases are practically the same.

The judgment is reversed, and the cause ordered dismissed.

DUNBAR, C. J., MORRIS, FULLERTON, and ELLIS, JJ., concur.

[No. 9914. Department Two. February 9, 1912.]

CURT AKERS *et al.*, *Respondents*, v. W. H. LORD *et al.*,
Appellants, E. S. WRIGHT, *Respondent*.¹

APPEAL—RIGHT TO ALLEGE ERROR—COPARTY NOT APPEALING. A plaintiff, dismissed from a case with prejudice, cannot have error thereon reviewed on an appeal by defendants, where the record fails to disclose that he took any appeal.

LOGS AND LOGGING—LIENS—ON LUMBER—TIME FOR FILING—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 1163, giving a logger's lien upon lumber while the same remains at the mill where it is manufactured or while in its possession and control, no lien can be claimed after the mill company had delivered it to a railway company, about a mile from the mill, the railway having taken possession and control of it.

LOGS AND LOGGING—LIENS—ELOIGNMENT—PRIOR TO FILING LIEN. Under Rem. & Bal. Code, § 1181, as to the eloignment of logs and timber "upon which there is a lien," there can be no eloignment prior to the filing of the lien.

SAME—PARTIES ENTITLED—COOK OR BOARDING-HOUSE KEEPER. Under the statute providing that a cook in a logging camp shall be regarded as a person who assists in obtaining the timber, one who runs a boarding house, furnishing all supplies for meals at so much per week to be paid for out of wages of the men, is not entitled to a lien as cook.

PARTNERSHIP—EVIDENCE—ADMISSIONS OF PARTNERSHIP. Upon an issue as to the establishment of a partnership, the admission of one partner is not evidence as against the other.

¹Reported in 121 Pac. 51.

LOGS AND LOGGING—LIENS—ELOIGNMENT—REMEDIES OF OWNER—SUBROGATION. In an action to foreclose logger's liens, where the liability of the owner of the timber depends upon his own wrongful act in eloigning the same, he cannot claim the right to subrogation against the contractor who failed to pay the labor bills of the lien claimants; since subrogation depends upon equity.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 31, 1911, upon findings in favor of the plaintiffs, in actions to foreclose loggers' liens. Affirmed in part and reversed in part.

Tucker & Hyland, for appellants.

Robert A. Welch (*Winter S. Martin*, of counsel), for respondents *Akers et al.*

Jno. Mills Day, for respondents *Krakenberger*.

MORRIS, J.—Consolidated actions to foreclose loggers' liens. W. H. Lord, as the owner of certain timber land, contracted with E. S. Wright to log the same and deliver the logs to the mill of the Two Rivers Lumber Company, near Tolt. Wright employed Akers and eight other respondents in his logging operations, and not having received their due, they filed liens on the logs and lumber at the mill and upon other lumber lying upon the right of way of the Chicago, Milwaukee & Puget Sound Railway Company, about a mile from the mill. These liens were all sustained, except the one of Bernard Krakenberger, whose suit was dismissed by the lower court. We are unable to determine the reason for such dismissal, as no finding is made in relation to Krakenberger's lien; nor is he mentioned until in the decree when he is dismissed with prejudice. He files a brief in this court in which he assigns the dismissal as error; but inasmuch as this record does not disclose that he has taken any appeal from such decree, it must be regarded as final as to him, and further attention will not be given his claim of error. As to the other claimants, the court found

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that the logs and lumber had been eloigned by appellants, and granted personal judgment against them.

This decree of eloignment furnishes the principal assignment of error. It will therefore be necessary to refer to the facts upon which it is claimed by respondents, and denied by appellants. Respondents commenced work for Wright about October 26, and quit December 6, 1910. The liens were filed December 10, with the exception of three, which were filed December 12, December 14, and January 4. There is some dispute as to the amount of lumber delivered to the railway, appellants fixing the amount at 45,000, while respondents put it at 180,000. It appears, however, that, whatever the amount was, the mill had been delivering to the railway company since the preceding July, and that the same teams used in hauling the logs to the mill were used in hauling the lumber from the mill to the railway. The men and teams quit work on December 6, and the mill closed down on December 14 or 15. The record discloses but one load delivered to the railway company subsequent to the filing of the liens on December 10. It is also apparent that, if the same men and teams hauled both the logs and the lumber, the lumber must have been delivered prior to December 6, when the men and teams quit work. No lien was claimed upon the logs or the lumber prior to December 10. It is manifest no lien could be enforced against the lumber after it had been delivered to the railway company and passed beyond the possession and control of appellants. This court has extended the provisions of Rem. & Bal. Code, § 1163, providing a lien upon lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, to the logger who assists in getting out the logs from which the lumber was manufactured, and who files his lien under § 1162. But the lien cannot be extended beyond the possession and control of the mill company. When, therefore, the mill company delivered this lumber to the railway company upon its right of way, it lost its pos-

session and control thereof, and no lien could be subsequently filed against it. *Robins v. Paulson*, 30 Wash. 459, 70 Pac. 1113; *O'Connor v. Burnham*, 49 Wash. 443, 95 Pac. 1013.

These liens were filed December 10. Any eloignment affecting them must have taken place subsequent to that date. There is not a particle of evidence in this record that it did, in so far as the lumber delivered to the railway company is concerned. The lower court seems to have been of the opinion that the liens could be sustained so long as the lumber was capable of identification, and that any attempt upon the part of the mill owner to change the identification would be an eloignment. The statute, however, makes "possession and control" the foundation of the lien upon the manufactured product, and not identification; and when the mill man loses his possession and control, the lien claimant loses his lien.

Neither could there be any eloignment prior to the filing of the lien, as under Rem. & Bal. Code, § 1181, there can be no eloignment except of logs and timber "upon which there is a lien." Hence, no eloignment could have taken place prior to December 10. Taking the most favorable construction of the evidence, we can only find that, at the time the liens were filed, there were 40,000 feet of logs at the mill and 60,000 feet of lumber. The mill ran until December 15. The only evidence of any delivery to the railway company subsequent to December 10 is that of Lord, who says, in response to a question of respondents' counsel, that he delivered lumber to the railway company subsequent to December 10. No attempt is made to follow up this testimony by showing, by this witness or any other, how much was delivered, except that Dimmick, one of the claimants, says Lord delivered one load subsequent to the filing of the liens. We are, therefore, because of a lack of evidence, brought back to the logs and lumber at the mill at the time of the filing of the liens, as the only lienable product upon which these liens could have been enforced, and upon which a finding of eloignment can be sustained. The highest value given to the logs is six dollars per

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thousand, which would amount to \$240 for the 40,000 feet. The only valuation we can find of the lumber is seven dollars per thousand, which would give us \$420 as the value of the lumber, and \$660 as the total value of the logs and lumber eloigned, and the greatest amount in which judgment could have been entered for the eloignment.

The court below found that the eloignment took place on or about December 15, and that thereafter the mill company delivered 180,000 feet of lumber to the railway company. The only evidence of delivery of this 180,000 is that it commenced back in July, and that so far as these lienors are concerned, it was made by the men and teams which quit work on December 6, four days before any lien was filed. The only evidence fixing December 15 as a date is that on that day the mill stopped running. Notwithstanding this finding, the court below sustained the lien of John Krakenberger, which was not filed until January 4, 1911, which was too late, even under the court's finding, to sustain any lien or eloignment as to him.

Among the liens sustained was that of John Dimmick and wife, who claim as cooks. The evidence shows, that these claimants made an agreement with Wright, whereby they furnished meals to the men at \$5.25, per week, to be paid by Wright out of the money earned by the men; that they were to furnish all of their supplies, and pay all the bills for such supplies. The statute provides: "The cook in a logging camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned." The only lien recognized by this statute is one for labor performed and services rendered. The cook, to the extent that he renders service as a cook, is entitled to a lien; but when he steps outside of his cookhouse and ceases to labor for wages, and becomes a boarding-house keeper, furnishing all the material and supplies, he is no longer within the purview of the statute, any more than any other laborer who furnishes necessary chains, ropes, tackle, or rigging for use in the logging opera-

tion, can claim a lien for the cost of such material. The statute limits the lien to labor performed and service rendered, and eliminates supplies and materials furnished, however necessary they may have been to the work engaged in.

In *Bradford v. Underwood Lumber Co.*, 80 Wis. 50, 48 N. W. 1105, it was held that, under a statute giving a lien for services as cook in a logging camp, one who furnished meals to the men at one dollar per day was not entitled to a lien as cook, the court saying:

"So far as the right to a lien is concerned, it [the statute] placed a cook upon precisely the same footing as the other employees performing work upon logs or timber. That is to say, any person who cooks food for men employed in doing any labor upon logs or timber shall have the same right to a lien for his services as such men have for whom the food is cooked. . . . But the section must be restricted to the services of the cook, and cannot be extended so as to embrace a claim for board, which includes the raw materials used in preparing the food. The lien is only given to one who cooks the food for those employed to do work upon the timber, where the provisions are furnished by the employer."

In *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009, it was sought to enforce a lien by one in the identical situation of Dimmick. The lien was denied in the lower court, but judgment entered against the logging contractor. Only the last feature of the judgment was sought to be reviewed here, it being conceded that the judgment of the lower court in denying the lien was right. The case is only valuable as a concession here made upon the point now involved. We, therefore, find error in sustaining the Dimmick lien.

There is some claim in appellants' brief that Bernard Krakenberger was a partner of Wright. There is no evidence in the record upon which such an assumption can be based. The only evidence is admissions of Wright, to various dealers with whom he sought credit, that Krakenberger was interested with him. Such declarations or admissions by Wright were not competent nor admissible as against Krakenberger. When a partnership is admitted or established, the

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declarations of one partner will to a large extent bind the other partners, but where the issue is the establishment of a partnership between two men, the relation cannot be established against one by the admission of the other.

Appellants also claim the right of subrogation against Wright and Bernard Krakenberger, or against Wright alone, if it should be held the partnership relation was not established. Subrogation is a doctrine of purely equitable origin and nature, and its operation is always controlled by equitable principles. The only liability enforceable against appellants grows out of their own wrongful act, the eloignment of the logs and lumber subject to respondents' liens. They are not, therefore, in a position to claim any equitable relief as against any one, being themselves wrongdoers. The plea of subrogation is therefore denied.

One other question is discussed in the briefs—the right of respondent Wiley to maintain a lien for hauling lumber. Under the conclusion we have reached as to the extent of the liability of appellants, the decision of this point is no longer material to appellants, as its decision in no way affects the liability to which they are held.

The judgment as against appellants is reversed as to respondents Dimmick and John Krakenberger. The right of lien is sustained as to the other respondents whose liens were established by the judgment, to the extent herein indicated. The appellants are found guilty of an eloignment of 40,000 feet of logs and 60,000 feet of lumber, of the total value of \$660, in which amount the liens established must pro rate. The record here does not disclose the situation as to Wright, and we cannot determine whether the judgment runs against him or not. If so, it is in no manner disturbed by our findings, and will as to all respondents remain as entered below. The cause is remanded to the court below for further proceedings in accordance with the views here expressed. Appellants will recover costs of this court.

MOUNT and ELLIS, JJ., concur.

[No. 9701. Department One. February 10, 1912.]

THE CITY OF WALLA WALLA, *Respondent*, v. DEMENT
BROTHERS COMPANY, *Appellant*.¹

EMINENT DOMAIN — DAMAGES — EVIDENCE—ADMISSIBILITY. Upon condemnation of twenty-two cubic feet of water to be taken from a creek thirteen miles above defendant's mill site, evidence is admissible to show that it would not result in a loss of that much water at the point of defendant's property; inasmuch as the ordinance to condemn the same did not show an intent to condemn water all of which belonged to defendant.

JUDGMENT — BAR — RES JUDICATA—MATTERS DETERMINED. An injunction against the diversion of water from a creek until riparian rights are condemned and awarding damages for past diversions, is not an adjudication that the taking of twenty-two cubic feet of water thirteen miles above appellant's property would amount to a loss of that much water at the point of appellant's property.

APPEAL—REVIEW—VERDICT. An award in condemnation will not be reversed on appeal as inadequate, where it is well within the evidence of disinterested witnesses, and the trial court refused to interfere after hearing and seeing the witnesses.

Appeal by defendant from a judgment of the superior court for Walla Walla county, Brents, J., entered April 4, 1911, upon the verdict of a jury awarding damages in a condemnation proceeding. Affirmed.

T. P. & C. C. Gose, for appellant.

Sharpstein & Sharpstein, John F. Watson and John W. Brooks, for respondent.

PARKER, J.—This is an eminent domain proceeding, prosecuted by the city of Walla Walla, for the purpose of acquiring the right to take water from a stream, which will result in damage to the riparian and water power rights of the defendant, Dement Brothers Company. A trial before the court and a jury for the purpose of determining the amount of the defendant's damage resulted in a verdict as-

¹Reported in 121 Pac. 63.

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sessing the same at \$10,000. Judgment was rendered accordingly, from which the defendant has appealed.

Appellant owns land situated near the corporate boundaries of the city of Walla Walla, in connection with which it has riparian rights in the water flowing in Mill creek. Appellant also owns a mill situated upon this land, which is operated by power obtained from the flow in Mill creek. The city seeks to acquire the right to take and divert, of the water of Mill creek, twenty-two cubic feet per second of time, at a point some thirteen miles above appellant's property, for the purpose of supplying the city and its inhabitants with water through its water works. Some three miles above appellant's property, the Yellowhawk creek has its intake from Mill creek, at which point the waters of Mill creek divide, forty per cent thereof flowing into and down Yellowhawk creek and sixty per cent thereof flowing on down Mill creek. It is conceded that the owners of riparian land bordering upon each of these creeks below this point are entitled to have the waters flow therein in this proportion.

Along these creeks, below the point of diversion of the water taken by the city, there are numerous riparian landowners having right to the use of the water flowing therein for irrigation and other purposes, and a considerable quantity of such water is so used by such riparian owners. It does not appear that the riparian and power rights of appellant in the water of Mill creek are superior to that of these riparian owners.

In order to intelligently discuss the contentions of counsel for appellant, it is necessary that we have at the outset a clear understanding of what the city is acquiring from appellant. If the city is actually taking from the appellant alone, the whole of the twenty-two cubic feet of water per second, that is one proposition; but if, by the city's taking the water from the creek some thirteen miles above appellant's property, appellant does not lose twenty-two cubic feet per second, to which it is entitled, that is quite another

proposition. Counsel for appellant seem to proceed upon the assumption that the first proposition presents the correct theory for measuring its damages; while counsel for the city insist upon the right to prove that appellant will not lose twenty-two cubic feet of water, to which it is entitled, by such diversion; that is, that all of the water so taken and diverted by the city is not water to which appellant has a legal right, or water all of which would reach appellant's land in any event if the city took none of it. This proceeding is authorized by Ordinance No. 1,509, by the city, a copy of which is attached to and made a part of its petition for condemnation, wherein the rights sought to be acquired by the city against appellant are specified as follows:

"The City of Walla Walla does ordain as follows:

"Section 1: That the use of the waters of Mill Creek to the extent of twenty-two cubic feet per second to be taken, diverted, and measured at the head works of the city water system located on said creek about 13 miles easterly from this city is a public necessity.

"Section 2: That all the right, title and interest of The Dement Brothers Company, a corporation, as riparian owners of lands abutting on said Mill Creek, and such water-power-rights as they may have in said stream, to the amount and extent specified in section 1 of this ordinance, are hereby ordered and directed to be condemned and the title thereto acquired by the City of Walla Walla in the manner provided by law, and that the proper proceedings therefor be taken forthwith."

The final judgment of condemnation and award of damages defines the right acquired by the city as follows:

"It is considered, ordered and adjudged by the court that, upon the verdict of the said jury, the plaintiff, the city of Walla Walla, is hereby adjudged and determined to be entitled, upon the payment to the defendant of the said sum of ten thousand dollars so awarded by the verdict of said jury, and the further sum of \$95.45, the defendant's costs taxed and allowed in this action, to take, divert and use water from that certain stream known as Mill creek, in Walla Walla county, state of Washington, to the extent of twenty-two

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(22) cubic feet per second of time; the said water to be so taken, and diverted from said stream at a point thereon about thirteen miles easterly from the city of Walla Walla, the said city hereby condemning, appropriating and acquiring, upon making such payments, all the right, title and interest of the said defendant in and to the said quantity of water so to be taken, measured and diverted at the place and in the manner provided by ordinance No. 1509 of said city attached to the amended complaint herein, as owner of lands and premises riparian to said stream situate, lying and being in the county of Walla Walla, state of Washington, particularly described as follows, to wit:”

Then follows a description of appellant’s land, which we have already noticed is some thirteen miles below the point of the city’s diversion of the water.

It is first contended by counsel for appellant that the learned trial court erred in admitting evidence tending to show the amount of riparian land irrigated by the owners thereof, other than appellant, from the waters of the creeks below the city’s point of diversion; and also erred in admitting other evidence tending to show that the water taken by the city would not all reach appellant’s land even if left in the creek by the city at the point of its diversion. It seems to us that the admissibility of evidence of this nature depends on whether or not the city is acquiring water all of which belongs to appellant alone, as if being taken directly from appellant at its property, or is only acquiring whatever right appellant might have in the quantity of water taken at the point of the city’s diversion, without having admitted that appellant had a right to any particular quantity of such water at that point. A critical reading of the ordinance above quoted, we think, will show that the city did not necessarily intend to take water all of which belonged to appellant, nor did it admit, by the manner in which it commenced the condemnation proceedings, that it was taking water all of which belonged to appellant. We think it clear that the city was simply seeking to acquire appellant’s interest in this quantity of water at the point of its diversion, and purposely

left the amount of appellant's interest therein open to proof to be made upon the trial. The city had a right to assume this position. It was not bound to proceed upon the assumption that all of the water it was taking belonged to appellant. A party seeking to condemn property, as against a defendant, is not bound to admit the nature or extent of the title of the defendant in such property; but may at the trial prove the nature and extent of such title or interest. It was the interest which appellant had in that quantity of water at the point of diversion, some thirteen miles above its property, and not the interest it might have in that quantity of water at its own property, which was at stake. If the taking of twenty-two cubic feet of water per second at the point of diversion resulted in the loss of a less quantity to appellant at their property, then its damage would be measured by the quantity actually lost to it, and not by the entire quantity the city was taking at its point of diversion. We think that this and other evidence, tending to show the diminishing of this water as it proceeded on its way to appellant's property was admissible for the purpose of showing that the water taken by the city was not all of it water which appellant was entitled to have reach its property.

Some contention is made against the admission of evidence of the nature we have just noticed upon the ground that it was thereby sought to prove facts which had been adjudicated against the city in a former suit prosecuted by appellant against the city. For the purpose of showing such adjudication, appellant offered in evidence a portion of the record in that suit, which indicates that it was prosecuted by appellant against the city to obtain an injunction against the city preventing it from taking water from Mill creek at the point of the city's diversion of the water, some thirteen miles above appellant's property, and at a point near appellant's property, and also to obtain damages from the city for loss of water on account of the city taking the same at these points previous to the termination of that suit. It appears by the

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portion of record so offered in evidence that the court awarded to appellant damages against the city in that suit, for water theretofore taken by the city from Mill creek at these points, and also decided that the city should be enjoined from continuing to take such water unless it commenced condemnation proceedings to acquire such right within sixty days after the entry of the decree in that case. We do not find in the portion of that record offered in evidence in this case any adjudication against the city which would preclude it from proving in this case that the taking of a fixed quantity of water at the point of its diversion some thirteen miles above appellant's property would not result in the loss of that same quantity of water to appellant at its property. It might possibly be argued with some reason, from the portion of that record here offered in evidence, that it was adjudicated in that suit that appellant had some interest in the water which it is taking, but clearly it is not shown thereby that the taking of a given quantity of water at the point of the city's diversion would result in a loss to appellant of an equal quantity at its property. We think this evidence was properly admitted and could not be excluded because of any former adjudication upon the facts sought to be proved thereby.

It is strenuously argued that the verdict is so manifestly inadequate in amount, in the light of the evidence, that appellant is entitled to a new trial upon that ground. While the evidence is in considerable conflict touching the amount of damages resulting to appellant, the amount thereof awarded by the jury is well within the testimony, especially that of those witnesses who were apparently disinterested. Clearly we would not be warranted in disturbing the verdict upon this ground, since the learned trial court declined to do so after seeing and hearing the witnesses testify. The argument of counsel for appellant upon this question seems to rest largely upon the theory that it was entitled to compensation for the loss of twenty-two cubic feet of water per second at its property. There is ample evidence, if believed by the

jury, to show that appellant will not lose that quantity of water by the city's appropriation at the point of its diversion.

What we have said applies to some of the other contentions not specifically mentioned by us. Other contentions are without merit, and we think do not require discussion. The entire record convinces us that appellant was awarded a fair trial conducted without prejudicial error against it.

The judgment is affirmed.

MOUNT and MORRIS, JJ., concur.

[No. 9598. Department One. February 10, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. DELLA TOTTEN,
Appellant.¹

HOMICIDE—JUSTIFICATION—EVIDENCE—ADMISSIBILITY — WITNESSES — CONTRADICTION. Upon a prosecution for homicide occurring in an altercation over a fence placed and defended by the accused in a private way, which was the only road for vehicles to the home of the deceased, evidence that a team could have been driven around the fence, by making a short detour over untraveled ground and an old logging road, is not admissible for the purpose of contradicting a witness for the state who testified that the private way was the only road for vehicles to the home of the deceased.

SAME — STATE OF MIND OF ACCUSED — EVIDENCE — ADMISSIBILITY. Neither is such evidence admissible as bearing on the state of mind of the accused when she shot and killed the deceased for tearing down the fence which she had helped her mother place in the road for the purpose of closing the road to the family of the deceased for its entire way.

SAME—JUSTIFICATION—EVIDENCE—ADMISSIBILITY. Neither is such evidence admissible to relieve the accused from being put in a bad light before the jury, as attempting to block the deceased from access to his home, where it was admitted that the purpose of the fence was to stop all trespassing by use of the only traveled road, especially where the court instructed the jury that the deceased was an unlawful trespasser, and that his destruction of the fence was an unlawful act which the accused had a right to resist to any degree short of taking human life.

¹Reported in 121 Pac. 70.

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SAME—STATE OF MIND OF ACCUSED—EVIDENCE—ADMISSIBILITY. In a prosecution for a homicide occurring in a quarrel between the deceased and the mother of the accused, which quarrel the accused took up three or four hours before the homicide, evidence of what occurred between the contending parties some time prior thereto, and of an offer by the mother of another way, is inadmissible for the purpose of showing the state of mind of the accused at the time of the homicide, where it is not shown that she was informed of the prior occurrences or of such offer.

SAME—EVIDENCE—DECLARATIONS OF ACCUSED—SELF-SERVING DECLARATIONS. Upon a prosecution for homicide, statements, not part of the *res gestae*, made by the accused to her husband expressing fear of the deceased and members of his family, are inadmissible as declarations of the accused made in her own favor.

HOMICIDE—DEGREES—MANSLAUGHTER—INSTRUCTIONS. Under the statute providing that homicides committed in certain ways shall constitute murder in the first degree, and if committed in certain other ways, murder in the second degree, and all other homicides, not being excusable or justifiable, shall be manslaughter, it is not error in defining manslaughter to use the words "voluntarily" and "involuntarily" as excluded in the definitions of first and second degree murder; and such words are not confusing as capable of a varied meaning without any further definition.

HOMICIDE—MANSLAUGHTER—PRESUMPTIONS—BURDEN OF PROOF—INSTRUCTIONS. An instruction that, a homicide being proven and murder in the second degree presumed, the burden upon the defendant to reduce it to manslaughter is sustained if, from all the evidence or want of evidence, the jury entertain a reasonable doubt as to defendant's guilt, is not objectionable as telling the jury that before the burden of reducing a homicide to manslaughter is sustained the jury must entertain a reasonable doubt of defendant's guilt.

HOMICIDE—INSTRUCTIONS—PRESUMPTIONS OF INNOCENCE. In a prosecution for homicide, an instruction that the presumption of innocence continues until it has been overcome by the evidence of the prosecution, beyond a reasonable doubt as to each and every material fact, is not open to the objection that the presumption of innocence could be overcome if the jury believed the evidence of the prosecution, without reference to the evidence of the defense, where in other instructions the jury were told that the whole of the testimony bearing upon any particular fact must be considered in arriving at a conclusion as to such fact.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 26, 1910, upon a trial and conviction of murder in the first degree. Affirmed.

Ira Thomas (*Martin Rozema*, of counsel), for appellant.
Fred Kemp and *Ludington & Kemp*, for respondent.

FULLERTON, J.—The appellant, together with one Hannah Beebe, was charged by an information, filed in the superior court of Chelan county, with the crime of murder in the first degree, for having, on August 10, 1910, in that county, shot and killed one James E. Sutton. The accused were awarded separate trials; and on the trial of the appellant, the jury found her guilty of murder in the first degree, as charged in the information. On the verdict of guilty, she was adjudged guilty and sentenced to imprisonment in the penitentiary for the term of her natural life. From the judgment and sentence, she appeals.

The facts leading up to the homicide are not seriously in dispute. On August 10, 1910, and for about ten years prior thereto, Hannah Beebe, who is the mother of the appellant, owned and occupied a tract of land originally containing one hundred and sixty acres, situated some five miles southwest of Cashmere, in Chelan county, in what is known as Brender canyon. Some time prior to August 10, Mrs. Beebe had sold to the appellant a three and one-half acre tract out of the west side of her one hundred and sixty acre tract; and the appellant, together with her husband and son, lived thereon, the husband owning other lands adjoining this tract lying to the west of Mrs. Beebe's land. The houses of the respective parties were but a few rods apart, and were located perhaps an eighth of a mile south of the northwest corner of Mrs. Beebe's original tract. To the west of Mrs. Beebe's land, was the land of James H. Sutton, who lived upon it with his family, consisting of his wife and six boys and four girls; one of the boys being James E. Sutton, who was killed as before stated. The Sutton land was at the head of Brender canyon, which maintained a northeasterly course through this tract as well as the tract owned by Mrs. Beebe. Mr. Sutton also owned a forty-acre tract lying immediately to the

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north of Mrs. Beebe's land, and abutting thereon. During the period that they had lived in the canyon, some four years, the Sutton family had made use of a private road which led from their home place in a northwesterly direction down through the land of Mrs. Beebe, through their other forty, and thence through other land to a county road leading to the town of Cashmere. Mrs. Beebe and the appellant also used this way to reach Cashmere, entering the road at a point opposite their houses and following it down through Sutton's forty-acre tract to the point where it intersects the county road. Brender canyon had formerly contained saw timber, and a number of logging roads had been constructed, branching off from the private road mentioned, and extending back through the land of Mrs. Beebe and the adjoining tracts. One of these roads connected with the private way but a short distance below the point where the road from the houses of Mrs. Beebe and Mrs. Totten connected therewith. This road extended for a short distance in a southerly direction, and for that distance paralleled the private traveled road. Mrs. Beebe's inclosures all lay west of the private way.

For some time prior to August 10, 1910, there had been ill feeling between the Sutton family and the appellant, arising from various causes, and between the Sutton family and Mrs. Beebe over the use of this private way; and on the 9th of August, Mrs. Beebe built a wire fence across the way, a short distance above the point where the road from her house connected therewith. The fence did not complete an inclosure, nor did it connect with any other fence Mrs. Beebe had upon her premises, but was intended to block the private way, and as an assertion of her rights to the land over which the road passed. Near the fence she placed a sign containing the words, "No Trespassing." That night the sign was demolished and the fence torn down where it crossed the way, as it developed on the trial, by some of the members of the Sutton family.

On the next morning, Mrs. Beebe drove to Cashmere for

the purpose of obtaining a warrant for the parties guilty of cutting the fence, but was unsuccessful for want of definite evidence as to who the guilty parties were. She returned home about noon, and going to the home of the appellant, discussed with her the cutting of the fence, and concluded to rebuild it. The mother then started for the fence, carrying with her some tools and materials, and was followed by the appellant some fifteen minutes later. The appellant carried with her a Winchester repeating shotgun, loaded with six shells. The two of them rebuilt the fence across the road, extending it a little farther in each direction than it was extended the day before. Mrs. Beebe also piled some brush in the logging road lying to the east of the traveled way, mentioned before as connecting with the traveled way a short distance below this point. Another sign was also put up. The appellant and her mother then took positions to the east of the road, about sixty feet therefrom, under the shade of a bush, and waited developments.

Some time later, perhaps about three o'clock in the afternoon, the elder Sutton drove down the road from his home with a load of wood, and seeing the fence across the road and the appellant and her mother sitting near it, stopped his team and came down to them. In the discourse which followed he was told that he could not go through, as the road was closed, and thereupon he returned to his team, pulled his load to one side of the road, unhitched his team and returned home with it. Shortly afterwards James E. Sutton, with his sister Nettie, some two years his senior, and his two younger brothers, aged fourteen and eleven years respectively, drove a single horse hitched to a buggy or hack down the road to the fence, stopping the horse some ten feet therefrom. Young Sutton immediately jumped out of the buggy and proceeded to cut the fence where it extended across the road, by putting the blade of an axe beneath a wire and striking on the wire with a hammer. As soon as he began cutting the wires, Mrs. Beebe arose and hastened down to the road, telling him not

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to cut the wires, at the same time calling his attention to the sign. He remarked to her that he did not care for signs, and kept on with his work. She thereupon sought to interfere with him by striking at his hands with a little axe she carried with her, but did not succeed in stopping him.

While this was going on, the appellant arose, picked up the gun which had theretofore remained out of sight, and approached the road. The happenings from then on are in dispute, but Nettie Sutton testified, and in this she is supported in a measure by her two brothers, that the appellant called to her brother, saying that she would shoot him if he did not cease cutting the wire; that her brother's back was towards the appellant, and without looking towards her, he answered that if she shot him he would hit her with the hammer; that immediately after he had cut the last wire, the appellant called to her mother telling her, "to stand aside and she would shoot him;" that her brother turned at that moment, and seeing the appellant, who had then reached within about ten feet of the road, with the gun pointed at him, dodged towards a stump which stood by the road immediately to his right in an attempt to get the stump between himself and the gun. He only partially succeeded—the appellant herself saying that he was far enough behind it "so that I couldn't hit him in the legs"—and was shot by the appellant in the neck, dying almost instantly. Mrs. Totten testified that, at the time she shot young Sutton, he was advancing towards her with the hammer raised above his head in an attempt to strike her, and that she shot him in self-defense.

The assignments of error all go to the rulings of the court on the admissibility of evidence, and to the court's charge to the jury.

In her direct examination, the witness Nettie Sutton testified that the road across which the fence had been constructed by Mrs. Beebe was the only way from the Sutton home to the forty-acre tract and to Cashmere. On cross-examination, she modified the statement by saying that it was the only way

to reach those places with a vehicle. While the husband of the appellant was on the stand as a witness for the defense, he was asked concerning another way that the Sutton family could have passed over with a vehicle in going from their home to their lower forty and to Cashmere. To this evidence, an objection was interposed and sustained by the court. The appellant thereupon offered to prove by the witness that a hack containing four persons and drawn by one horse, such as the hack and horse testified to as having been driven on the day of the homicide by James E. Sutton, could easily have been driven over a route commencing some distance south of the point where the fence was placed across the road, and extending from thence in a northeasterly direction to the logging road mentioned before as lying immediately east of the traveled way, then on down the logging road to its connection with the traveled way, although "it is not pretended that there is any built or graded road at this place." The court adhered to its ruling, holding the evidence inadmissible. By the same witness, the appellant later on offered to show that the elder Sutton could have driven with his load of wood from a point on the traveled way a few rods south of the fence, thereon in an easterly direction to the logging road before mentioned and thence down the road to its connection with the traveled way a few rods below the fence. This evidence was likewise rejected. Again the appellant offered to prove by the same witness that he had driven around the fence subsequent to the homicide with a team. This offer of proof was likewise rejected.

The appellant's counsel argue the admissibility of this evidence on several grounds. It is contended, first, that it was admissible for the purpose of contradicting the state's witness Nettie Sutton; and second, that it was admissible as bearing upon the state of mind of the appellant at the time she committed the homicide. It is argued, also, that the evidence on the part of the state tended to show that the blocking of this road shut the Sutton's off from their home,

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and served no useful purpose otherwise, thus putting the appellant in a bad light morally before the jury, while if she had been permitted to show that such was not the fact, the effect of the state's proof would have been mollified, and possibly induced the jury to render a verdict for a lesser degree of crime than the verdict they did render, or possibly induced them to consider with more favor the appellant's testimony as to the transactions immediately preceding the death of the Sutton boy than they apparently gave to it.

But we think none of these reasons require the admissions of the rejected evidence. If it were material to contradict the witness Nettie Sutton on the matter mentioned, it will be noticed that the proofs offered do not have that tendency. In the first place, the record makes it plain that the witness was referring to traveled ways, not the possibility of driving a team through the timber and over the underbrush between the points mentioned. Again, to go over the route described would not avoid the use of the fenced way entirely. It would simply have enabled the one pursuing it to pass around the fence, thus avoiding the use of the road for a few rods only; and to show this fact does not contradict in any material degree the statement that the fenced road is the only road between the points concerning which the witness testified. Evidence contradicting the statement of an opposing witness, to be admissible on that ground alone, must relate to some material matter; it must relate to the substance of the evidence, not to its mere technical accuracy.

Nor does the second ground stated require the admission of the evidence. It must not be forgotten that the appellant was not representing any right of her own by her presence at the time of the homicide. She was there solely as an assistant to her mother, and her mother makes it plain in her own testimony given on behalf of the daughter, that her purpose was to close the road to the Suttons for its entire way through the land, not merely that portion across which

the fence was stretched. If there were other ways, the Suttons were equally forbidden to travel them. This is further evidenced by the fact that the mother, in the presence of the appellant, threw brush in the logging road over which it was proposed to show a wagon could have been driven. The only possible purpose the testimony could serve was to show that the Suttons had incensed the mother by insisting on this particular way out when there were other ways at their disposal. But the foundation of this contention falls when it is shown that the mother herself intended to forbid trespassing upon the land in any manner.

The third branch of the contention is untenable on like grounds. Mrs. Beebe herself, as we say, made it plain that she intended by the fence and her protests to both the elder and younger Sutton to forbid them the use of the entire way, and the jury could not have inferred from the mere fact that she had left it possible for a wagon to be driven over the land, that she did not intend to cut them off entirely. Moreover, the state admitted on the trial, and the court charged the jury, that Mrs. Beebe acted wholly within her rights when she fenced the way in question. The jury were also charged that the person killed and the other members of the Sutton family were unlawfully trespassing on her property at the time of the homicide, and that the destruction of the fence was an unlawful act which Mrs. Beebe, and through her the appellant, had the right to resist to any degree short of taking human life, or the infliction of dangerous bodily harm. No additional light on the tragedy would have been thrown by the admission of the rejected evidence, and we find no reversible error in the court's ruling.

The appellant further offered to show by the husband of the appellant, that he, as the representative of Mrs. Beebe, sometime prior to the homicide, had visited the Suttons and told them that a certain gate in a fence extending across the road different from the one in question had been locked, that the key was with Mrs. Beebe, and that any time that

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they wished to pass through the gate they could get the key by calling at Mrs. Beebe's house and asking for it; that James E. Sutton, the person killed, stated that he would not go for the key, but would go through the gate in the morning; that subsequently the gate was found open and partially demolished; "but it is not pretended that we can prove by this witness that it was demolished or opened by any one of the Sutton family." These proofs were rejected, we think properly. Such evidence, if admissible at all, could only be for the purpose of showing the state of mind of the accused at the time of the homicide. But the mind of the appellant could not be affected by the fact offered to be shown unless the fact was known to her. There can be no presumption that it was so known. As we have said, the land was the property of Mrs. Beebe, not that of the appellant, and it is not shown, nor offered to be shown, that the appellant took up her mother's quarrel earlier than three or four hours before the homicide was committed.

The same answer can be made to the offer to show that Mrs. Beebe had offered to the elder Sutton a right of way across her land by another route on which a road could be constructed without great difficulty and on reasonable grades. It could not have any bearing upon the appellant's condition of mind, because it was not shown, nor offered to be shown, that she knew the fact.

The appellant offered to show that, at various times prior to the August 10, 1910, the appellant had expressed to her husband fear of certain members of the Sutton family, particularly James H. Sutton and James E. Sutton; that she was afraid they would do her bodily injury, particularly in the nighttime, and was afraid they would do bodily injury to the witness, her husband. The statements and declarations of the accused in her own favor, unless they are a part of the *res gestae*, or unless made evidence by the prosecution in producing conversations in which they are contained, are inadmissible as evidence on the part of the accused on

her trial for an offense to which they relate. Such statements and declarations are excluded, "not because they might never contribute to the ascertainment of the truth, but because if received they would most commonly consist of falsehoods, fabricated for the occasion, and would mislead oftener than they would enlighten." 12 Cyc. 426; *State v. Gates*, 28 Wash. 689, 69 Pac. 385.

The court, among others, gave the jury the following instructions:

"I now direct your attention to the crime of manslaughter, which is included within the crimes charged in the information; and I instruct you, as a matter of law, that if you are satisfied beyond a reasonable doubt from the evidence, that the defendant, Della Totten, did shoot and kill the deceased, James E. Sutton, in the manner alleged in the information, in this county and state, and further find that such killing was not purposely done and was not done upon deliberation and with a premeditated design to effect the death of deceased, but was done by the defendant without any design to effect his death, and that it was done either voluntarily upon sudden heat or involuntarily but in the commission of some unlawful act and are satisfied beyond a reasonable doubt that it was not in self-defense, then your verdict should be that the defendant is guilty of manslaughter. In order to reduce voluntary homicide to the grade or degree of manslaughter, it is necessary, not only that adequate cause exist to produce a degree of anger, rage and sudden resentment or terror sufficient to render the mind incapable of cool reflection, but also that such a state of mind did actually exist at the time of the commission of the offense.

"The court instructs you, as a matter of law, that if a homicide, that is, the killing of one human being by another, is proven beyond a reasonable doubt, as explained to you, the presumption of the law is that it is murder in the second degree; and, if the state would elevate it to that of murder in the first degree, it must establish all the statutory characteristics of murder in the first degree from the evidence and beyond a reasonable doubt; that, on the other hand, if the defendant would reduce it to manslaughter, or justify it, the burden is upon the defendant so to do. This burden on the defendant is sustained, if, from all the evidence in the case, or want

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of evidence in the case, you entertain a reasonable doubt as to the defendant's guilt.

"You are further instructed that the law presumes the innocence of a person accused of crime and this presumption is not a matter of form merely, which the jury may disregard at pleasure, but is a part of the law of the land and is a right guaranteed by that law to every person accused of crime; this presumption of innocence continues with the defendant throughout all the stages of the trial and until the case has been finally submitted to the jury and the jury has found that this presumption has been overcome by the evidence of the prosecution in the case, beyond a reasonable doubt as to each and every material fact."

It is objected to the first instruction that it is confusing, inasmuch as it does not sufficiently distinguish manslaughter from murder in the second degree; the precise contention being that the terms "voluntarily" and "involuntarily" as used in the instruction were capable of a varied meaning. But we think the instruction free from fault in this regard. The statute, it will be remembered, defines manslaughter by words of exclusion, rather than by words of inclusion. It first prescribes that homicides committed in certain ways shall constitute murder in the first degree, next that homicides committed in certain other ways shall constitute murder in the second degree, and then prescribes that all homicides committed in ways other than there specified, not being excusable or justifiable, shall be manslaughter. The court was therefore compelled to resort to a somewhat circuitous method of making clear to the jury the acts constituting manslaughter, and in doing so we do not think he misused the particular terms complained of, or that such terms are not in such common use as to be readily understood by jurors without further definition.

The second instruction is objected to, "because," to use the words of counsel, "its effect is to tell the jury that before the burden of reducing the homicide to manslaughter is sustained by the defendant the jury must entertain a reasonable doubt of the defendant's guilt."

But an instruction in this form was approved by us in *State v. Melvern*, 32 Wash. 7, 72 Pac. 489, where it was said:

“A substantially similar instruction was considered and sustained by this court in *State v. Payne*, 10 Wash. 545, 39 Pac. 157, on the authority of *State v. Cain*, 20 W. Va. 679, 709; *Hill v. Commonwealth*, 2 Grat. 594, and other cases cited in the opinion, and 2 Thompson on Trials, § 2208. This instruction is an exact copy of the form of an instruction given by Thompson in the section of his work on trials above noted; and the learned author, in a footnote to said section, says that, ‘The principle embodied in the above instruction is believed to be universally acknowledged.’ ”

The precise objection now urged against the instruction was not made in the case cited, but we think the instruction without error nevertheless. The natural and obvious meaning of the language used is directly contrary to the interpretation put upon it by the appellant, and we think the jury could not have misunderstood the instruction.

To the third instruction counsel made the following criticism:

“The error in this instruction is that it virtually instructs the jury that the presumption of innocence could be overcome if they believed the evidence of the prosecution in the case and excludes them from inquiring into the question as to how far the testimony on the part of the prosecution was modified or neutralized by that produced by the defendant, or what inference should be drawn from any of it.”

We think the criticism unjust. It is true, the instruction does not contain the modification suggested by counsel, but it is not practicable for the court to incorporate in each paragraph the exceptions and modifications of the general rules there announced. It is sufficient if the charge as a whole contains these modifications. Elsewhere in its charge, in this instance, the court made it clear to the jury that the whole of the testimony bearing upon any particular fact must be considered by them in arriving at a conclusion as to such fact.

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Opinion Per Curiam.

There is no substantial error in the record and the judgment will stand affirmed.

MOUNT, PARKER, and GOSE, JJ., concur.

[No. 9924. Department One. February 14, 1912.]

PURCELL SAFE COMPANY, *Respondent*, v. H. A. BARNHART,
Appellant.¹

APPEAL—RECORD—PRESERVATION OF GROUNDS—EXCEPTIONS. In the absence of a statement of facts and of exceptions to the findings of fact, the objection that the evidence does not sustain the findings is not available on appeal.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered May 22, 1911, upon findings in favor of the plaintiff, upon a trial to the court, in an action in replevin, and for damages. Affirmed.

Faussett & Smith, for appellant.

Hughes, McMicken, Dovell & Ramsey, and *France & Hellsell*, for respondent.

PER CURIAM.—The statement of facts had been stricken in this case prior to its argument on appeal. There being no question raised as to the pleadings, and no exceptions having been taken to the findings of fact, the only question that is left for the consideration of this court, is, Do the facts found by the court sustain the judgment? They so plainly do that a discussion of them would be unprofitable. In fact, it is not urged by the appellant that such is not the case. The only questions urged are that the evidence does not sustain certain findings of the court, and error in the admission and rejection of testimony. As we have seen, these are objections which are not available to the appellant in the absence of a statement of facts. Such being the state of the record, the judgment is affirmed.

¹Reported in 121 Pac. 53.

[No. 10086. Department One. February 14, 1912.]

DELLA M. HOTCHKIN, *Appellant*, v. McNAUGHT-COLLINS
IMPROVEMENT COMPANY *et al.*, *Respondents*.¹

LIMITATION OF ACTIONS—TRUSTS—NATURE OF RELATION—TRUST OR AGENCY—RECOVERY OF DAMAGES. An attorney who contracted with plaintiff and one C. to perfect the title to certain tide lands for a one-fourth interest therein, the title to be taken in the name of C. as trustee, does not become a co-trustee with C. and C's successors, where the lands were sold and defendants failed to account to plaintiff for her part of the proceeds; hence an action against the attorney and C's successors, to recover plaintiff's share of the proceeds, is not an action to declare a trust, as far as the attorney is concerned, but as to him, is an action at law for damages, to which the statute of limitations applies, where it is not alleged that the attorney received the title or any part of the proceeds which could be impressed with a trust, his codefendant being trustee for both parties.

PLEADING — COMPLAINT—PRAYER—ACTIONS—LEGAL OR EQUITABLE. In an action at law to recover money, the addition of a prayer for "such other relief as to equity may belong" does not change the nature of the action.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 31, 1911, upon sustaining a demurrer to the complaint, dismissing as to one of the defendants an action for damages. Affirmed.

Jas. M. Epler, for appellant.

Peters & Powell, for respondent Trimble.

Ballinger, Battle, Hulbert & Shorts, and *George E. de Steiguer*, for respondents McNaught-Collins Improvement Company *et al.*

CHADWICK, J.—On April 20, 1895, plaintiff and one William Collins entered into a contract with defendant William P. Trimble, in which Trimble bound himself, in consideration of a one-fourth interest therein, to perfect the title to certain tide lands near the west channel of the Duwamish river, which

¹Reported in 121 Pac. 455.

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Opinion Per CHADWICK, J.

plaintiff and Collins claimed the right to purchase under the land laws of the state. It was further agreed that the application to purchase should be made in the name of Collins, and that when title was perfected he would retain a half interest and convey an undivided one-fourth to plaintiff. It is alleged that, by virtue of the contract, Collins became a trustee for the plaintiff, and that Trimble, by becoming a party to the agreement, also became a trustee. Collins made application to purchase the land. Pending an appeal from a decision of the state board of land commissioners to the superior court of King county, he died, and it is said, that his heirs and Trimble sold and disposed of all of the interests represented by him and the preference right to purchase to the McNaught-Collins Improvement Company; that the sale was made without notice to plaintiff and without her knowledge or consent; that she received no part of the consideration paid for the tide lands at the time of the sale, nor has she since received anything for her interest in the land. Plaintiff further says that all parties had full notice of her interest, and that the McNaught-Collins Improvement Company, as well as the heirs of Collins, and Trimble and one C. B. Bussell became trustees of her interest in the lands and of the funds arising from the sale, and are liable to her for the amount and value of her interest. Within a few weeks, plaintiff learned of the sale of the land and the rendition of a decree in the superior court, in which no account was taken of her interest, if any she had, and she thereupon filed a petition to vacate the judgment. Reference to the case of *Hotchkim v. Bussell*, 46 Wash. 7, 89 Pac. 183, may be had for an account of this proceeding. The decree of the lower court in the original proceeding was entered on the 27th day of July, 1903. This action was begun on June 28, 1910. From an order sustaining the demurrer of defendant Trimble, this appeal is prosecuted.

The only question calling for present consideration is whether the statute of limitations has run against appel-

lant's right to recover the value of her interest from defendant Trimble. Appellant insists that this is an equitable action to which the statute does not apply. She bases her claim of equity upon the expression used by this court in the case above noted; that is, that "the decree is valid though the trusteeship continues in the other parties." It is insisted that this is equivalent to holding that all parties to that proceeding were trustees, and as such, they can be charged without reference to any time limit in a court of equity. Reference to that decision, as well as the complaint before us, would indicate that the "trusteeship" there referred to is the trusteeship in Collins; or, he being dead, that which would follow in his heirs or personal representatives or those taking title with knowledge of plaintiff's claims.

It is doubtful whether Trimble, who engaged only to conduct the proceedings and who never undertook to, and so far as this record shows, never did, take title in his own name, could be charged as a trustee. If he violated his agreement, it would seem that appellant's remedy would be at law in an action for damages, and as we read the complaint it is an action for damages as against him. It is not alleged that he ever had a preference right to purchase, and therefore he could not convey it. He never agreed to, and so far as the complaint shows, never took title or the proceeds of any sale so as to change his relation of agency to that of trustee. If, as an attorney having appellant's alleged interest in the land in charge, he, either by inadvertence or design, permitted a decree to be entered which deprived appellant of a lawful right, he would not thereby be changed from a *co-cestui que trust* with appellant to a co-trustee with the heirs of Collins. Collins was, by the terms of his contract, a trustee for both appellant and Trimble. As will be seen by reference to the complaint, appellant is seeking damages which she says are, "such sum of money as the testimony upon the hearing of this action may show her interest in said lands to be worth." The further demand,

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“and for such other and further relief as to equity may belong,” adds nothing, nor can it convert an action otherwise legal into a suit in equity. The character of an action must be measured by the allegations of the complaint, and this, taken by its four corners, is a ratification of Trimble’s conduct, and a prayer for the value of her interest in the land to be paid in money. The only way to hold Trimble as a trustee would be to show that he had title to the property or had received the proceeds of a sale thereof. The complaint shows neither. It affirmatively alleges that the title is in another, and goes no further than to allege that Trimble and others are trustees of the funds arising from said sale. It is nowhere alleged that the land was sold for a consideration in money, or that Trimble ever received any funds or other property which would be subject to the impressment of a trust.

We are so fixed in our opinion that as to Trimble this is a law action and barred by the statute of limitations, that we shall not enter into a discussion of the application of the statute of limitations to suits in equity, reserving that very interesting question, as well as a review of our own decisions upon the subject, for consideration in some case where it is germane to the issue. We make no ruling as to the character of the action, as applied to the other parties defendant.

Judgment affirmed.

DUNBAR, C. J., GOSE, CROW, and PARKER, JJ., concur.

[No. 9982. Department One. February 15, 1912.]

E. A. PALMER *et al.*, *Respondents*, v. IRA HUSTON, *Appellant*.¹

LOGS AND LOGGING—CONTRACTS—PERFORMANCE OR BREACH—PARTIAL PERFORMANCE—DAMAGES. Upon breach of a logging contract by defendant, plaintiffs can recover at the contract price for logs cut and delivered by them up to the time of defendant's breach.

APPEAL — REVIEW — HARMLESS ERROR — COUNTERCLAIM—INSTRUCTIONS. Upon breach of a logging contract by defendant, an instruction that the defendant could counterclaim for damages sustained by reason of plaintiffs' failure to fully perform the contract is error favorable to the defendant of which he cannot complain.

TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE. An instruction that the preponderance of the testimony is the excess over the amount necessary to balance the scales, entitling the party furnishing it to a verdict, is proper.

Appeal from a judgment of the superior court for Cowlitz county, McKenney, J., entered June 12, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Frank Groundwater, Geo. W. Rowan, and W. H. Abel, for appellant.

Joseph O'Neill and J. N. Percy, for respondents.

CHADWICK, J.—This action was brought to recover a balance due on a logging contract, which plaintiff says was breached by defendant. Defendant admits the contract, but alleges that plaintiffs failed to perform, and sets up a counterclaim for damages. A jury found against the defendant upon all the issues in the case. From a judgment on the verdict, defendant has appealed.

Appellant complains that the court instructed the jury that they should return a verdict for the plaintiffs for all the timber cut and placed in the Cowlitz river, at the agreed price of \$3.50 per M. Appellant says:

¹Reported in 121 Pac. 452.

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"It is our position that, if Palmer and Barstow voluntarily stopped performance, they could not recover upon their contract for their part performance. If they have any remedy at all, it will be upon a *quantum meruit*."

We might so hold if we were at liberty to reject plaintiffs' theory of the case. The jury found defendant to be in fault, and this being so, plaintiffs could recover on their contract for the amount of logs delivered up to the time of the breach. The court gave the following instruction:

"Upon defendant's counterclaim, you are instructed that, if you find from the evidence that plaintiffs, after entering into this contract, wrongfully failed to perform said contract and abandoned their work under the same, and refused to carry out the cutting and delivery of logs under said contract, and that defendant was injured thereby, you must find for the defendant upon his counterclaim for such damages, if any, as you find he has sustained by reason of plaintiffs' breach of such contract, if you find there was a breach of contract on the part of plaintiffs."

It is said this is inconsistent with the instruction just considered; that the two cannot stand together. Here again appellant fails to take notice of respondents' case. Considering the theory of both parties to this suit, if there is any fault in the instruction, it is in this, that it fails to take notice of the charges that might properly be made as counterclaims in the event that the jury found for appellant. The instruction is more favorable to the appellant than the pleadings warrant, and he cannot complain.

Error is also predicated upon the court's definition of the term "preponderance of evidence." The court said:

"It is the excess over the amount of testimony necessary to balance the scales, and when we say the burden of proof is upon the party, we mean simply that he must furnish that excess before he is entitled to a verdict."

This definition was written by this court in *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409, 31 Pac. 748, and upon that authority is approved.

There is no statement of facts in this case. Measured by the pleadings, and with the assumption that the several allegations of the complaint were sustained by some evidence, we cannot say that any of the instructions complained of are erroneous or prejudicial.

Judgment affirmed.

DUNBAR, C. J., PARKER, CROW, and GOSE, JJ., concur.

[No. 9594. Department One. February 15, 1912.]

GEORGE M. FUESTON, *Respondent*, v. P. L. LANGAN,
Appellant.¹

MASTER AND SERVANT—SAFE PLACE—EXCAVATIONS—ASSUMPTION OF RISKS—OBEDIENCE TO ORDERS. A laborer in a ditch being directed by his employer to work in a particular place at a particular time, the employer being present, may assume the safety of the place, and may recover for injuries received by the falling back of a rock, negligently left on the edge of the ditch at the surface without sufficient support.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 5, 1911, upon findings in favor of the plaintiff, after a trial before the court, in an action for personal injuries sustained by a laborer in a ditch. Affirmed.

McWilliams, Weller & McWilliams, for appellant.

George W. Sommer, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court for Spokane county, to recover damages for personal injuries alleged to have been received by him as the result of the defendant's negligence while in his employ as a laborer in digging a sewer ditch, in Spokane. The cause was tried before the court without a jury, resulting in find-

¹Reported in 121 Pac. 55.

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ings and a judgment awarding the plaintiff \$300 damages, from which the defendant has appealed.

Respondent's injury was caused by a rock, which had been thrown from the ditch during its excavation, falling from the surface of the ground at the edge of the ditch upon the respondent while he was working therein. There is no dispute as to the immediate cause of his injury nor as to its extent. The alleged negligence upon which respondent rests his right of recovery is that appellant carelessly and negligently left the rock dangerously near the edge of the ditch with such meager support that it fell upon respondent while he was at work. Appellant rests his defense upon assumption of risk and contributory negligence upon the part of respondent. Appellant was constructing a sewer for the city of Spokane, having a contract with the city therefor. The work was being done under the immediate supervision of appellant and his son as his assistant foreman. Respondent was employed in the work as a laborer at the time of his injury, and for some two weeks prior thereto. He was comparatively inexperienced in work of this nature. The portion of the ditch for the sewer which was open at the time was from four to eight feet deep, and over a hundred feet long.

In the afternoon of August 23, respondent was at work in the ditch assisting in its excavation, when the son directed him to go to another point in the ditch, about 100 feet distant from where he was then working, there to receive instructions from appellant as to his work. Respondent proceeded along the bottom of the ditch, passing other workmen on his way, and upon arrival at the point to which he was directed to go, he found appellant there, who then directed him relative to his work. As to what occurred then and within an hour following, respondent testified as follows:

"Q. What conversation, if any, did you have with Mr. Langan at the time that you went up to work at this particular point? A. Well, he says, 'Here is where I want you to

work,' and he says, 'You go down three or four feet deeper here before you put in your laggings.' And there was a man working in behind me, and he says, 'I am afraid that will cave if you go down that deep,' and I turned around to Mr. Langan and says, 'Will this cave if I go down any deeper?' And he says, 'You go down four feet deeper before you put in your laggings.' And then he came back after awhile, I don't know just how long it was, and there was a fellow came up to the ditch to throw back the stuff—well he got up on the ditch to throw back the stuff and Mr. Langan put him down in the ditch and says, 'You go down in the ditch, it is not deep enough; I will take care of this on top.' . . . Well, when he got ready for me to put in my laggings he came along and he handed me over a lagging and he says, 'You put this lagging in over next to the brace over there, and then you go ahead and put your lagging in on that side first,'—that was the south side. Well, I took the lagging and I put it down in behind the brace that runs along the ditch, and there was a rock dropped down in behind it, and he says, 'You take that rock out of there and let that lagging down in the ditch as far as you can get it,' and I tried to reach down with my pick to take the rock from the lagging, but my pick was so short I could not get it, so I stooped down on my left knee and worked the lagging with my left hand and working the rock out with my right when this rock came rolling in over the top."

This was the rock which injured respondent. When respondent arrived at this point and first commenced work there, the ditch was at least four feet deep; he himself testifying that it was too deep for him to stand in the bottom and see over the upper edge of it, though the trial court was inclined to the view that it was only four feet deep, as indicated by his remarks. While there was some serious conflict in the evidence upon some of the material facts, we think the trial court was fully warranted in believing that they are substantially as we have above summarized, and as related by respondent in his testimony above quoted. The trial court found that the proximate cause of respondent's injury was that appellant carelessly and negligently left danger-

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ously near the edge of the sewer ditch the stone with such meager and insufficient support that it rolled into the ditch, striking respondent and injuring him; but made no finding as to respondent's contributory negligence or assumption of risk, from which fact we assume, of course, that those defenses were regarded by the court as not having been sustained. It seems to us that the judgment must be sustained upon the ground that appellant, having directed respondent to work at this particular place at the particular time, being then present, he impliedly assured respondent that the place was safe; and that respondent was entitled to rely upon this implied assurance, unless the danger was so plain and obvious that a reasonable person would not have assumed to proceed under the specific directions of his master. We are not able to say, as a matter of law, that respondent assumed the risk or contributed by his own negligence to his injury, and clearly there was sufficient evidence to warrant the court in finding that appellant was negligent. This view finds support in *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A. (N. S.) 367; *Anustasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342, and cases there cited. We conclude that the judgment must be affirmed, and it is so ordered.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 10100. Department Two. February 15, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.
CHARLES PRYOR, *Appellant*.¹

CRIMINAL LAW — TRIAL — MISCONDUCT OF COUNSEL — FAIR TRIAL. Upon a prosecution for abortion, the defendant is deprived of his right to a fair trial, where evidence was received that he had repeatedly ravished the prosecuting witness and compelled her to commit sodomy with him, and his motion to strike the same was granted only upon exacting an admission that the prosecuting witness was pregnant by him.

ABORTION — EVIDENCE OF OTHER CRIMES — SODOMY — ADMISSIBILITY. In a prosecution for abortion, evidence of the commission of sodomy with the prosecuting witness is inadmissible.

CRIMINAL LAW — MISCONDUCT OF COUNSEL. Where, in a prosecution for abortion, improper evidence of acts of sodomy with the prosecuting witness has been stricken, it is highly improper for the state to cross-examine the defendant concerning the acts of sodomy, and it cannot be said that the prejudicial effect thereof and of the evidence is cured by sustaining objections thereto and instructing the jury to disregard the evidence.

Appeal from a judgment of the superior court for King county, Gay, J., entered October 28, 1911, upon a trial and conviction of abortion. Reversed.

A. G. McBride and *Jay C. Allen*, for appellant.

John F. Murphy, *Alfred H. Lundin*, *H. B. Butler*, and *T. J. L. Kennedy*, for respondent.

ELLIS, J.—The appellant was convicted of the crime of abortion, attempted by the use of certain instruments upon the person of one Regna Abramson, and prosecutes this appeal from the judgment of the court thereon. Many errors are assigned, but as they are not of a nature likely to recur when the case is retried, we deem it unnecessary to review all of them. Neither do we find it necessary to review the competent evidence in relation to the crime actually charged,

¹Reported in 121 Pac. 56.

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further than to say that it would probably be sufficient to sustain the verdict, had we reason to believe that it formed the sole basis of that verdict, and had the accused been accorded that fair and impartial trial according to law which is the natural right of every person accused of any crime, whatever its nature. Whether guilty or innocent, the defendant was entitled to such a trial, and the state could demand nothing less. An examination of the record convinces us that it has not been accorded in this case.

/In his opening statement to the jury, the assistant prosecuting attorney said, among other things, that the state would prove that the defendant threw the prosecuting witness upon the ground and had intercourse with her by force and against her will, and had compelled her to commit acts of sodomy with him upon five different occasions. The defendant objected to these statements and requested the court to instruct the jury to disregard them. The court overruled the objections and declined to so instruct.

Counsel for the defense, in his preliminary statement to the jury, admitted that, shortly after they became acquainted, the defendant and the prosecuting witness began living together the same as if they were husband and wife. As a part of the state's case in chief, the prosecuting witness was permitted, over objection of the defendant, to testify that the defendant, by force and threats, had ravished her many times, and had, on five different occasions, by threats with a revolver and handcuffs, compelled her to commit the crime of sodomy with him.

After this evidence, with all of its revolting details, had been admitted, the defendant still insisting upon his objections thereto, moved the court to strike it. The court then intimated that, if the defendant would admit that the complaining witness was pregnant by the defendant, the motion would be granted. The defendant, bartering away one right in the hope of preserving another, accepted the terms offered and admitted that the prosecuting witness was pregnant by

him. The court then struck the evidence relative to the crimes of rape and sodomy, and instructed the jury to disregard it. Evidence of pregnancy of the woman by the defendant was clearly a part of the state's case, as showing motive for the crime of abortion charged. The admission thus procured was in its nature extremely damaging to the defense. It cannot fairly be said that it was voluntary.

It requires no citation of authority to show that the accused did not have a fair trial. After the admission of the defendant's illicit cohabitation with the prosecuting witness, which was made in his preliminary statement to the jury, it is plain that evidence of rape was neither necessary nor proper. The defendant's admission of illicit cohabitation had already supplied conclusively whatever evidence of motive for the crime of abortion that illicit intercourse, whether by force or otherwise, could furnish. Evidence of rape could not more conclusively establish the only material fact to which it could in any case have been directed, namely, illicit intercourse as showing motive. Its only added tendency was to inflame the minds of the jurymen against the defendant by unnecessarily introducing a distinct and degrading crime of which he was not charged in the information.

The evidence as to the crime of sodomy was even more plainly inadmissible, at any time or for any purpose. It could not tend to prove the crime of abortion nor could it tend to supply a motive for that crime. In cases of this kind, the only admissible evidence of other crimes than that charged in the indictment or information is evidence of such crimes as tend to establish an intent or to show a motive to commit the abortion. For example: to establish intent, evidence that the defendant has committed abortion on the same, or even on another woman, is admissible; and to establish motive, it may be shown that the defendant was the author of the woman's pregnancy or has had illicit intercourse with her. 1 Ency. Evidence, pp. 54, 55. We have

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been cited to no authority, and have found none, holding that evidence of wholly distinct crimes not necessary to prove, nor tending to prove, either of those things is admissible in a trial for abortion.

On cross-examination of the defendant, the state's attorney, notwithstanding the fact that the evidence had been stricken, questioned him concerning the alleged acts of sodomy. This was highly improper. While the court sustained an objection thereto, and instructed the jury to disregard this, its tendency was to keep before the minds of the jury the stricken evidence.

These errors were so vital, and the effect of the incompetent evidence, from its very nature, so prejudicial, that we cannot say that they were cured by the order to strike, and the instruction to disregard. If the testimony of the prosecuting witness as to the other two crimes not charged in the information was believed, it would inevitably create a prejudice in the mind of any human being not lower in his moral makeup than the beasts of the field. We have no assurance that the jury did not believe it. It would be to the credit of the jury, rather than to its discredit, if, believing this testimony, it entertained a prejudice against the accused, ineradicable by any order striking the testimony, or by any instruction, however clear and forcible, to disregard it. A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and a just application of its principles. It may be that the defendant is guilty. On that we express no opinion. It must be remembered, however, that "though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community." *Hurd v. People*, 25 Mich. 404.

The circumstances of this case impel us to reaffirm and emphasize what is said in *State v. Montgomery*, 56 Wash. 443, 105 Pac. 1035, 134 Am. St. 1119:

"It is not our purpose to condemn the zeal manifested by

the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims."

The judgment is reversed and a new trial ordered.

DUNBAR, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

[No. 9895. Department Two. February 15, 1912.]

LESLIE G. SLOCUM, *Respondent*, v. SEATTLE TAXICAB
COMPANY, *Appellant*.¹

CORPORATIONS — CONTRACTS — OFFICERS AND AGENTS — AUTHORITY. Where the superintendent of a corporation in charge of its business and of a building in which it repaired its taxicabs, had general power to employ and discharge men, a written contract whereby he employed plaintiff to do all the company's trimming and painting for one year, and leased a part of the second story of the building to plaintiff as a shop, is within the apparent scope of his authority and binding on the corporation, so far as the employment of the plaintiff is concerned, although the superintendent's actual authority was limited to verbal employment of men from day to day.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 13, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Brightman & Tennant, for appellant.

Shorett, McLaren & Shorett, for respondent.

¹Reported in 121 Pac. 67.

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Opinion Per MOUNT, J.

MOUNT, J.—Defendant prosecutes this appeal from a judgment in favor of the plaintiff. There is no substantial dispute upon the following facts: In May, 1909, the defendant corporation occupied a building in Seattle, in which building the corporation kept and repaired a number of automobiles. This building was occupied by defendant as a tenant from month to month. Mr. A. C. Stevens was in active charge of the building, and was designated by the president of the company as superintendent. He had authority to employ and discharge such men as were needed about the business. On May 1, 1909, Mr. Stevens and the plaintiff entered into the following written agreement:

“Seattle Taxi-Cab Company
“Broadway, Corner Union Street, Seattle,
“Contract. Date May 1st, 09.

“Leslie G. Slocum agrees to pay the sum of \$25 per Mo. to Seattle Taxi-Cab Co. for shop on second floor for trimming & painting, and to do all the said Co's work at 25 per cent less than other shops, as long as above contract is fulfilled he is to have said shop one year from date.

“(Signed) A. C. Stevens, Supt. of Taxi-Cab Co.
“Leslie G. Slocum.”

The plaintiff thereupon partitioned off a room on the second floor of the building and occupied the same and did the defendant's work in a satisfactory manner. Bills for work done were rendered weekly by plaintiff, and the agreed rent was deducted therefrom. The balance was paid by the defendant until about January 3, 1910, when the defendant refused, apparently arbitrarily, to give the plaintiff any more work, and ejected him from the building. The president of the corporation did not know about the contract. It was shown to him by the plaintiff at that time. He thereupon informed plaintiff that the contract was void because Mr. Stevens had no authority to make it. The plaintiff at that time had done some work for which he had not been paid. He presented a bill therefor, amounting to \$89.05. The defendant issued a check to the plaintiff in payment of the

bill. The plaintiff presented this check to the bank for payment, but payment was refused unless plaintiff would sign a receipt "in full of all claims to date" against the defendant company. Plaintiff refused to sign such receipt, but retained the check. He thereafter brought this action to recover upon three alleged causes of action. By the first cause he sought to recover \$1,773, alleged damages for failure to furnish him work for the balance of the year according to the contract. By the second cause he sought to recover \$1,000 for the alleged breach of the lease. By the third cause he sought to recover upon the check \$89.05. Upon the trial of the case, the court found that the plaintiff had been damaged in the sum of \$316.35, by reason of the failure of the defendant to supply him with work. The court found upon the second cause of action that he was not entitled to recover for a breach of the contract of lease. The court found that he was entitled to recover \$89.05 upon the check.

The defense made in the lower court, and insisted upon here, is that the contract was void because the superintendent, Mr. A. C. Stevens, had no authority to make it. The president of the company testified that Mr. Stevens had authority from him to superintend and look after the business, and employ and discharge men from day to day, but had no authority to enter into a written contract, either of employment or for a lease of the building; that under the by-laws of the corporation the president only had such authority.

We are satisfied that it was not incumbent upon the plaintiff or any other employee to hunt up the president of the company, or to obtain the charter or the by-laws of the company, in order to determine the authority of one who occupies the position of superintendent of a business, so as to make a valid contract of employment. It is conceded that the superintendent in charge had authority to employ men, and that he did so. The fact that he prepared and signed the written contract in this case as superintendent was sufficient

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to bind the company, because the contract was made in the course of his apparent authority as well as his expressed authority to hire and discharge men. This is especially true in this case where the plaintiff acted in good faith and did not know, and had no reason to suspect, that the superintendent had no authority to reduce the contract to writing, or that he was limited in the employment of men to a day by day employment. In *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 115 Pac. 841, this court said:

“If each and every individual having business with such a corporation must at his peril ascertain and determine the exact scope and limitation of the agent’s authority, it is manifest that he could not safely deal with the acknowledged agent, and that the corporation itself would be materially impaired. The public is compelled to rely upon the apparent authority of the conceded agents of such corporations, especially when, as managers or superintendents, they are placed in control of departmental affairs.”

In *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125, we said:

“In this day and age when so large a part of the business of the commercial world is transacted through the agency of corporations, those dealing with them cannot be expected to prove the authority of corporate agents by producing a power of attorney under the corporate seal. They have a right to rely upon the apparent authority of those with whom they deal, and for acts done within the scope of that authority the corporation is bound.”

We are of the opinion, therefore, that the company was bound by the contract in so far as it related to an employment of the plaintiff for the year. The judgment must therefore be affirmed.

DUNBAR, C. J., MORRIS, FULLERTON, and ELLIS, JJ., concur.

[No. 9980. Department Two. February 15, 1912.]

LESLIE SMITH, *Respondent*, v. CLARENCE HOPPER *et al.*,
Appellants.¹

MECHANICS' LIENS—RIGHT TO LIEN—WAIVER. The right to a mechanics' lien on a subcontract is not waived by the fact that the subcontractor relied upon the credit of the principal contractors when he entered into his contract, he not intending to waive his right.

SAME—RIGHT TO LIEN—MATERIALS—ACCOUNT. A painter under a subcontract does not lose his right to a lien from the fact that he did not keep an accurate book account of the paint which he took and used from another job, where he is able to state the amount and value of the same.

SAME—PERFORMANCE OF CONTRACT—ALTERATIONS—EVIDENCE. A building contract authorizing the architect to order any alteration in plans or specifications without in any way interfering with or lessening the agreement, does not authorize the architect to order a complete change in the interior finish, whereby the cost of a painting contract amounting to \$230 would have been increased \$145, the architect requesting him to do the work for an increase of \$25; and upon conflicting evidence as to whether the plaintiff was ordered to cease work, findings that he had performed and could treat the contract as rescinded will be sustained.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 17, 1911, in favor of the plaintiff, after a trial before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

Alderson & Murphine, for appellants.

Mitchell & Lawrence, for respondent.

MOUNT, J.—Plaintiff brought this action to foreclose a mechanics' lien. The trial court entered a judgment in his favor for \$75, with interest and costs, and ordered a sale of the liened property to satisfy the judgment. The defendants have appealed.

It appears that the defendants Wiley and Leiendecker had

¹Reported in 121 Pac. 77.

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Opinion Per MOUNT, J.

a contract for the construction of a dwelling house for the defendants Hopper and wife. These contractors sublet the painting of the house to the plaintiff, for \$230. Plaintiff did a part of the work, but did not complete the same because the character thereof was changed after he had begun work, and because, he alleges, no agreement was made as to the value of the extra work, and further because, he alleges, he was directed by the contractors to quit. Appellants argue that the cause should have been dismissed because the plaintiff testified that, when he took the contract to do the painting, he relied solely upon the credit of Mr. Wiley whom he knew, and also because he carried paint from another job to this one and kept no account of such paint.

The plaintiff did testify as stated, but it is clear, from his whole evidence, that he did not intend to waive his right to a lien in case he was not paid for his work. What he meant was that he knew the contractors and knew they were good for his pay, and that he relied upon that fact when he entered into the contract. His testimony was that he did not intend to waive his lien even though he thought they were good. A workman usually regards his employer as good for his pay, and enters into employment with the idea that the employer will pay when the payment becomes due, and relies upon that fact. But the mere fact that he so relies does not necessarily imply or prove that he thereby waives his right to the statutory lien which may finally become necessary in order to enforce his rights. In *Heald v. Hodder*, 5 Wash. 677, 32 Pac. 728, the court found that the work was done with no intention to claim a lien. Such is not the fact in this case. The fact that the plaintiff did not keep an accurate book account of the paint which he took from one job to another is of no especial importance, when he is able to state the amount and value of the materials used in the particular building against which the lien is sought. In this case the plaintiff furnished his own paints and was able to testify to the

amount he furnished and used on this particular building. The fact that he brought a part of it from some other job, or from the store where he had purchased it, was therefore entirely immaterial.

Appellants next argue that the trial court should have found upon the evidence that plaintiff refused to perform his contract, and therefore was not entitled to recover. The evidence is very conflicting upon this question. The plaintiff testified that, after he began work, a material change was made by the architect in the character of the inside finish, and no agreement was made as to the value of the work, that the contractors Wiley and Leiendecker had trouble with the architect and directed the plaintiff to do no more work, and that he obeyed this direction. The defendants denied that they directed plaintiff to cease work. It is apparently conceded that a material change was made in the work, and that plaintiff did not agree to the price offered for the change. But it is argued that the plaintiff was required to perform the work as changed because of a provision in the specifications, which reads as follows:

“The architect is to have full power to order in writing on behalf of the owner any alteration in either plans or specifications during the progress of the work, without in any way interfering with or lessening the agreement made upon the plans and specifications.”

This provision, of course, does not mean that an entirely different building may be required, or, as applied to this particular painting contract, that an entirely different finish should be put by the painters upon the interior of the building. It means immaterial changes which do not materially affect the agreement. It is conceded that a change was made in the character of the finish required. The architect requested the plaintiff to enter into a new contract for the sum of \$25 increase over his previous contract. The plaintiff testified that the change would have cost him \$145 in excess of the original plan. This would be a material change

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in a \$230 contract, and one which would not be authorized by the provision quoted. In view of this fact, and in view of the conflict of the evidence upon the question whether the plaintiff was directed to quit his work and therefore treat it as rescinded, as in *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 815, we are not disposed to disturb the judgment to the effect that the plaintiff was entitled to recover the reasonable value of the work done by him.

The judgment is therefore affirmed.

DUNBAR, C. J., MORRIS, FULLERTON, and ELLIS, JJ., concur.

[No. 10037. Department Two. February 15, 1912.]

F. R. NETTLETON *et al.*, Appellants, v. G. L. EVANS *et al.*,
Respondents.¹

CHATTEL MORTGAGES—CONSTRUCTION—RIGHTS OF MORTGAGEE—POSSESSION—REPLEVIN. A provision in a chattel mortgage that in case of default the mortgagee may take immediate possession and proceed to sell the same in the manner provided by law, must be construed to have reference to the taking of possession by the method provided by statute for the foreclosure thereof, as an exclusive remedy; and consequently replevin cannot be maintained.

Appeal from a judgment of the superior court for Pacific county, Smith, J., entered August 1, 1911, upon sustaining a demurrer to the complaint, dismissing an action of replevin. Affirmed.

Edward H. Wright, for appellants.

Chas. E. Miller, for respondents.

DUNBAR, C. J.—This is, in brief, an action in replevin, to recover possession of certain personal property which was the subject of a chattel mortgage given by the respondents to the appellants. The action was commenced after the debt

¹Reported in 121 Pac. 54.

had become due. The mortgage, in addition to the usual conditions, contained the following:

"It is further understood and agreed that, if the first party shall fail to pay the indebtedness secured by this mortgage, or any part thereof, to the said second parties, or shall make default in any of the terms or conditions of said mortgage or shall fail to protect and safely keep and care for the said personal property, or any part thereof, or whenever the said second parties upon reasonable grounds shall deem said debt unsafe or insecure, then the said second parties may take possession of the said personal property wherever the same may be, and immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount of said debt, together with the costs of said sale, including a reasonable attorney's fee."

The complaint set forth the mortgage, and contained the usual allegations of default, demand, etc. To the complaint a demurrer was interposed, to the effect that the facts stated did not constitute a cause of action. This demurrer was sustained, and the action dismissed. From a judgment of dismissal, this appeal is taken.

The sole question presented is as to the legal effect of the clause above set out in the mortgage. It was held by the trial court that such clause did not have the effect to confer upon the plaintiffs any right to possession of the property, while the appellants contend that such clause conferred upon them the right to take immediate possession upon default, and that, upon refusal of defendants to deliver possession, they can maintain an action in replevin. So that the question becomes largely one of construction of a contract, and we are not aided in any appreciable degree by the cases cited by appellants from this court, as the legitimate deductions therefrom cannot be applied to the particular question involved in this case, or at least they are not necessarily applicable. The exact question, as baldly presented in this case, has never been before this court. However, in *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062, in referring to the attempt of the

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mortgagee to take possession of mortgaged property under a provision in the mortgage conferring such rights, it was said:

“Because a party to a contract violates his contract and refuses to do what he agreed to do, is no reason why the other party to the contract should compel the performance of the contract by force. The adoption of such a rule would lead to a breach of the peace, and it is never the policy of the law to encourage a breach of the peace. The right to an enforcement of this part of the contract must, in the absence of consent on the part of the mortgagor, be enforced by due process of law, the same as any other contract.”

While that case differs from this in that the possession here is sought to be obtained through legal process, the underlying principle announced was that the provision for taking possession should be construed to be a provision for taking possession in the manner prescribed by the statute. The decision in this case was noted with approval in *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53, where it was held that, notwithstanding an agreement in a lease permitting the landlord to take possession by force, the landlord's common law remedy had been abrogated by the statute, and the methods provided by the statute were exclusive remedies.

Keeping in view the basic idea, that the interest of the mortgagee in the mortgaged property does not rise above a security interest, we think it is consistent to hold that the provision in the mortgage should be construed with reference to the methods provided by statute for subjecting the security to the payment of the debt. The judgment is affirmed.

FULLERTON, MOUNT, MORRIS, and ELLIS, JJ., concur.

[No. 9991. Department Two. February 16, 1912.]

C. N. LINDQUIST *et al.*, Respondents, v. THE CITY OF
SEATTLE, Appellant.¹

MUNICIPAL CORPORATIONS—CLAIMS—DESCRIPTION OF INJURY. A claim against a city "accurately describes" the injury, within the requirements of a city charter, so as to admit proof of a sprained ankle causing permanent injuries, where it alleges that claimant's leg was fractured and bruised necessitating a surgical operation and that claimant will be disabled many months.

PLEADINGS—AMENDMENTS TO CONFORM TO PROOF—SURPRISE—CONTINUANCE. It is not an abuse of discretion to allow an amendment to conform to proof as to the permanent nature of personal injuries, where the court offered to appoint physicians for a physical examination, with a view to granting a continuance if the examination demonstrated a surprise preventing a fair trial, and defendant failed to avail itself of the offer.

MUNICIPAL CORPORATIONS—SIDEWALKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Plaintiff, injured by a fall by stepping on a loose plank in a defective sidewalk, is not guilty of contributory negligence, as a matter of law, from the fact that many of the boards were loose and rattled when stepped on, he never having been over the walk before; plaintiff having a right to assume the safety of the walk.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 18, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for injuries sustained in a fall upon a sidewalk. Affirmed.

Scott Calhoun and *James E. Bradford*, for appellant.

Brady & Rummens and *Elmore Winkler*, for respondents.

ELLIS, J.—Action for personal injuries to the plaintiff C. N. Lindquist, caused by a fall through a defective sidewalk, on Harrison street, near the alley between Sixth and Seventh avenues north, in the city of Seattle. Harrison street runs in an easterly and westerly direction, and is crossed by Sixth and Seventh avenues, running north and

¹Reported in 121 Pac. 449.

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south. From Sixth avenue eastward to the alley, the sidewalk lay upon stringers on the ground. These stringers were decayed and many boards were loose so that they rattled under the feet. From the alley towards Seventh avenue, the sidewalk was raised on a trestle some seven feet above the ground. The evidence shows that this, also, was in a generally bad condition, and had been so for at least six months. This part of the sidewalk, however, was more solid than that which lay upon the ground. About 3 o'clock in the afternoon of July 31st, 1910, the plaintiff husband and his wife were walking eastward on Harrison street, and had passed over the sidewalk from Sixth avenue to the alley, and for about one-third of the distance from the alley to Seventh avenue, when he stepped upon the end of a plank which gave way beneath him, letting him fall through the sidewalk to the ground below causing the injuries complained of.

Trial was had to a jury, and at the conclusion of the plaintiff's evidence, the defendant challenged its sufficiency by motion, which was overruled. The city rested its case without offer of evidence. The jury returned a verdict of \$1,000. Motions for a new trial and for judgment notwithstanding the verdict were made and overruled. The judgment was then entered, from which the defendant city has appealed.

(1) The first error assigned is based upon the admission of evidence of a sprained ankle causing permanent injury. It is urged that the claim filed with the city in compliance with a requirement of the city charter was insufficient to admit of such proof, since the sprain was known to the claimant when he filed the claim. The notice of claim described the injury as follows:

"That by reason of the claimant falling violently through the opening as aforesaid, the said claimant's leg was fractured and bruised to such an extent that he was compelled to undergo a surgical operation and will be disabled for many months to come. That in falling the claimant was bruised about the arms and has suffered great pain and anguish."

The description of the injury in the complaint was couched in similar terms.

Section 29, of article 4, of the charter of Seattle, prescribing such claims, provides as follows:

“All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant.”

It will be noted that the charter requires no more specific description of the injury than of the defect which caused the injury. The obvious purpose of the charter provision is to insure such notice as will enable the city, through its proper officials, to investigate the cause and character of the injury while the facts are comparatively recent, and thus protect itself against fraudulent or exaggerated claims. This court, in common with many others, has held that, where there is a *bona fide* effort to comply with the law, and the notice filed actually accomplished the purpose of notice as to the place and character of the defect in the street, it is sufficient though defective, if the deficiencies therein are not such as to be actually misleading. *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658. This court has also held that claims of this character are to be viewed with at least that liberality which is accorded to a pleading. *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938. These, and many other decisions which might be cited, show that this court has never adopted that Draconic strictness of construction which would sacrifice the just and reasonable purpose of the law to a technical exactness of terms, making it a pitfall for the ignorant and unskillful, rather than a reasonable protection against the fraudulent and designing.

“It is a sound view that such a notice is sufficient when couched in general terms that cannot be misunderstood, and

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that technical accuracy and nicety of particularization are not necessary." 5 Thompson, Commentaries on Law of Negligence, § 6328.

The same rule applies in stating the nature and extent of the injury.

"Where the statute requires such a notice to state the nature of the injury, it will be *sufficient if the statement be made in general terms* which cannot be misunderstood. As in the case of statements touching the *place* and *cause* of the injury, technical terms and detailed accuracy are not required." 5 Thompson, Commentaries on Law of Negligence, § 6338.

Since the charter requires nothing more specific as to the injury than as to the defect which caused it, we can conceive of no good reason why the above rules should not apply to the one as well as to the other. Applying these rules to the case before us, it is obvious that the notice that the claimant's leg was "fractured and bruised to such an extent that he was compelled to undergo a surgical operation," should be held sufficient to allow proof of a bruised leg from the knee to the foot, and an ankle so sprained and ligaments so ruptured as to necessitate a surgical operation, which was the proof made. The injuries described in the notice and those proved were so nearly related in location and character that notice leading to inquiry and examination as to the one would necessarily afford full knowledge as to the other. *Bradbury v. Inhabitants of Benton*, 69 Me. 194; *Reno v. St. Joseph*, 169 Mo. 642, 70 S. W. 123; *City of Dallas v. Moore*, 32 Tex. Civ. App. 230, 74 S. W. 95.

The facts in the case of *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091, are plainly distinguishable from the facts here. The notice there stated that,

"She was greatly bruised and injured and her whole right side was paralyzed and she suffered great pain under her kidney and right hip joint and she also suffered severe pains in her right leg."

The claim was filed twenty-one days after the injury, and the claimant testified that, within five days after receiving the injury she knew that her eyesight was impaired. The court held that the notice was insufficient to admit proof of injury to the eyes. It is too obvious for comment that there was in that case no such relation between the injury described in the notice and that sought to be proved either as to location or character, as that presented here. We are constrained to hold that the notice here under consideration was sufficient to permit proof of the sprain and consequent permanent injury to the ankle. *Owen v. Seattle*, 64 Wash. 10, 116 Pac. 261.

(2) It is next assigned as error that the court permitted the plaintiffs to amend their complaint to conform to the proof showing permanent injury, and in refusing the defendant's request for a continuance on the ground of resulting surprise. The court, in denying the continuance, offered to interrupt the trial and appoint physicians to examine the plaintiff, and stated that, if such an examination demonstrated a surprise to the extent that it could not be fairly met, he would pass upon the motion later. Counsel for the city did not see fit to avail himself of that offer, and the court, on the following morning, proceeded with the trial. In this we find no error. The offer of the court was an ample protection against the alleged surprise, and when it was not accepted there was no abuse of discretion in refusing a continuance. *Knapp v. Chehalis*, 65 Wash. 350, 118 Pac. 211.

(3) Finally, it is contended that the plaintiff was guilty of contributory negligence as a matter of law. In this we find no merit. While the evidence shows that many of the boards were loose and rattled under the feet especially where the sidewalk lay upon the ground, it also shows that they were more secure upon the trestle. The city maintained no sign, barrier, or other warning to indicate that the sidewalk was not safe, but tacitly invited the public to use it, and it was in constant use. The plaintiff had not been upon it

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before and knew nothing about it. He had the right to assume that the sidewalk was reasonably safe throughout its entire width. *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978; *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79. Whether the plaintiff was guilty of contributory negligence was a question for the jury. *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. 844; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114.

The judgment is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9355. Department One. February 16, 1912.]

WENZEL STRUNZ *et al.*, Appellants, v. SPOKANE COUNTY,
*Respondent.*¹

HIGHWAYS—ESTABLISHMENT—POWERS OF COUNTY AND TOWNSHIPS—JURISDICTION. Rem. & Bal. Code, § 9368, enlarging the powers of township officers over highways in the township and providing that nothing in the act shall affect the rights of counties over roads in which the county generally is interested, etc., does not affect the jurisdiction of the county over a county road wholly within the township sought to be established by the county commissioners, under Id., §§ 5623 to 5656; the township not being forced to aid in its construction.

HIGHWAYS—ESTABLISHMENT—APPEAL—REVIEW ON APPEAL. Landowners cannot object to the confirmation of the establishment of a county road because of insufficiency of the county's tender of compensation for land to be taken, which, under Rem. & Bal. Code, §§ 5634, 5635, is not final, the statute providing that, if such tender is not accepted by the landowners, condemnation proceedings must be instituted for the purpose of fixing the damages.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered February 28, 1910, upon

¹Reported in 121 Pac. 75.

sustaining an order establishing a county road, upon appeal from the board of county commissioners. Affirmed.

Belt & Powell, for appellants.

John L. Wiley and O. J. Saville, for respondent.

PARKER, J.—The county commissioners of Spokane county established a county road across land belonging to Wenzel Strunz and wife, under proceedings had in pursuance of the law relating to the laying out and opening of county roads, as found in §§ 5623 to 5656 inclusive, Rem. & Bal. Code. From the decision of the county commissioners so establishing the road, Strunz and wife appealed to the superior court for Spokane county, and the decision of that court being adverse to them, they have appealed therefrom to this court.

In October, 1908, certain citizens of Spokane county petitioned the county commissioners of that county to establish a county road to be known as the "Starr road," a portion of which road when established would pass over and occupy land belonging to appellants. The proposed road lies wholly within the boundaries of Newman township, as organized and existing under the laws of the state. Thereafter, and prior to March 3, 1909, a considerable portion of the right of way for the road was secured by the county commissioners, by donation and otherwise, and there was also pledged by subscription a considerable amount of money and work to aid in the construction of the road. On March 3, 1909, there had been enacted, and that day approved by the governor, certain amendments to the township government law, one of which enlarged the powers and duties of township supervisors relative to the establishment of highways, as follows:

"The supervisors shall have charge of such affairs of the town as are not by law committed to other town officers; and they shall have power to draw orders on the town treasurer for the disbursement of such sums as may be necessary for the purpose of defraying the incidental expenses of the town,

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and for all moneys raised by the town to be disbursed for any other purpose. They shall have charge of all highways and bridges in their respective townships, and the care and supervision thereof; and shall have power to divide their respective townships into road districts and to appoint one resident elector of each road district as overseer thereof for the first year of township organization; to establish new highways and bridges, and to vacate or alter highways and bridges wholly within the township: Provided, nothing in this title contained shall be construed as prohibiting any county from or denying to any county the power to build, repair, alter and maintain at the county's expense such highways and bridges as the county generally is interested in, or such as may be of so large cost that a single township could not undertake the construction of, or such as are located in sparsely settled townships as are unable to construct the same." Rem. & Bal. Code, § 9368; Laws of 1909, p. 76, § 4.

But for these powers conferred upon township supervisors, there would be no question of the power and jurisdiction of the county commissioners to establish this road. The matter appears to have been pending before the county commissioners and continued from time to time, both prior to and after the going into effect of this law of 1909. The formal notice of the hearing upon the petition for the establishment of the road before the county commissioners, as provided by Rem. & Bal. Code, § 5633, seems not to have been given until after the going into effect of the 1909 law. That notice having been duly given, in pursuance thereof the county commissioners, on September 7, 1909, heard and determined the question of the establishment of the road, appellants being present and participating in that hearing, when the commissioners rendered and recorded their decision finally establishing the road, over the objections of the appellants. The commissioners awarded to appellants \$150 damages for the right of way for the road across their land, and caused that sum to be tendered to them, which they declined to accept. From this disposition of the matter, appellants gave notice of their appeal to the superior court for Spokane

county, and upon the decision of that court being rendered adverse to them, they appealed to this court.

It is first contended that the superior court erroneously affirmed the action of the county commissioners because they did not have jurisdiction to establish a road of this nature after the passage of the law of 1909, the argument being, that, by the terms of that law, the establishment of such a road became a matter exclusively within the jurisdiction of the supervisors of the township. We are not able to agree with this contention. While the law of 1909 seems to enlarge the powers of township supervisors relative to establishing highways, its proviso, we think, clearly shows that the powers of the county commissioners relative to establishing county highways wholly within townships is not lessened thereby.

Some contention is made that to permit the county commissioners to establish this road is to allow them to interfere with matters of local concern belonging to the township and its people, and will result in burdening the township against the will of its people. We are not able to see how the acts of the county commissioners in this regard can result in forcing the township to assume any burden that it does not desire to assume. We are not advised of any law that assumes to give to the county commissioners power to compel the township to pay any money, either towards the establishment, construction, or maintenance of this road, against its will. Counsel for appellant call our attention to a minute made in the record of the county commissioners on July 9, 1909, as follows: "Mr. West and Mr. Taylor appeared in regard to the Strunz road, the board declared it was up to the township officers to take charge of it." This it is argued indicates that the county commissioners expect the township to aid in maintaining the road. But this, to our minds, does not even constitute a threat on the part of the county commissioners to burden the township against its will. We are quite unable to understand how it could in

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the least menace the rights of the township or its people, whatever thought the commissioners intended to express thereby. It will be noticed that this occurred long before the matter was disposed of, and it might well be argued that it only had reference to the township officers doing something towards assisting the county to bring about the establishment of the road. It seems to us, that, from the very fact that the county commissioners are assuming to establish this road, we must assume that it is to become such a road as it is contemplated by the proviso of the 1909 law above quoted, is within their jurisdiction to establish. As long as the township is not forced against its will to aid with its funds in the establishment, construction, or maintenance of the road, neither it, nor any of its citizens in its behalf, can complain of the county's efforts to establish it. We are of the opinion that the county commissioners had jurisdiction of the matter and that the learned superior court was not in error in so holding.

At the hearing before the superior court appellants sought to introduce evidence for the purpose of showing the inadequacy of the award made to them by the county commissioners, which evidence the court declined to receive. This is claimed to be error. There might be some reason in such contention, if the commissioners' decision as to the amount of their award to appellants as damages for the county acquiring the right of way over their land, was a final decision upon that question; but a very casual reading of Rem. & Bal. Code, §§ 5634 and 5635, will show that such determination is only for the purpose of fixing an amount which the commissioners decide to tender to appellants. Appellants may accept it or decline it as they choose. They cannot complain because the tender is less than they deem adequate compensation for their land. If they reject it, then condemnation proceedings are to follow against them; and until their land is acquired by condemnation in a proceeding instituted for that purpose in the superior court, it cannot be

taken from them. We think the learned trial court was not in error in rejecting evidence upon that question.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and FULLERTON, JJ., concur.

[No. 9825. Department One. February 16, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Frank Rose, Appellant*, v. W. J. HINDLEY, *as Mayor of the City of Spokane et al., Respondents*.¹

MUNICIPAL CORPORATIONS — CHARTERS — ORDINANCES—IMPLIED REPEAL—OFFICERS. A new city charter, purporting to be the entire organic law of the city, which provides that every ordinance in force at the time of its adoption not inconsistent with the charter shall continue in force until amended or repealed, and that employees within the scope thereof in office at the time of its adoption shall retain their positions, does not continue the office of city bacteriologist, provided for pursuant to provisions of the old charter establishing a board of health, where the new charter makes no provision for such office or for any board of health, but leaves that subject to be regulated by the general laws in force applicable to all cities whose charters make no special provisions for boards of health; since the new charter is in no sense an amendment of the old, which is effectually repealed, even though there is no express repealing clause.

MUNICIPAL CORPORATIONS—OFFICERS—RIGHT TO OFFICE—ESTOPPEL TO QUESTION RIGHT. Upon a proceeding against a city for reinstatement to an office that had been abolished by city charter, it is immaterial that another person had been employed to fill the same position (DUNBAR, C. J., and GOSE, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 30, 1911, upon sustaining a demurrer to a complaint, dismissing an action for a writ of mandamus. Affirmed.

¹Reported in 121 Pac. 447.

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Skuse & Morrill, for appellant.

Wm. E. Richardson and *A. M. Craven*, for respondent Hindley and City of Spokane.

Burcham & Blair, for respondent Hinman.

PARKER, J.—The relator, Frank Rose, commenced this action in the superior court for Spokane county to compel his reinstatement in the employ of the city as a bacteriologist, from which employment he claims to have been unlawfully dismissed by the mayor. Upon the sustaining of demurrers to the relator's complaint, he elected to stand thereon and not plead further, when judgment was rendered against him denying the relief he prayed for. He thereupon appealed to this court.

In 1893 the legislature passed an act providing for the creation of city boards of health, in all cities and towns of the state, to consist of the members of the respective city and town councils or of such persons as they might appoint wholly or partially from their own members. These boards are to perform such duties as are specified in the act and such as are prescribed by other state laws relating to boards of health. They are also to appoint a health officer for their respective cities or towns, whose duties are prescribed by the act. While this is a general law applicable to all cities and towns, it is provided therein that the provisions thereof are not to apply to any city in which a board of health is organized and a health officer appointed under the provisions of a special charter. This would leave cities of the first class free to regulate the organization of their boards of health by their own freehold charters, if they choose to do so. This law is still in force. Rem. & Bal. Code, §§ 5535-5540. Prior to December, 1910, the special freehold charter of the city of Spokane provided for the organization of a board of health for the city, and gave the city council power to pass ordinances to carry out the provisions of the charter relating to that subject. In February, 1910, in pursuance of that

charter provision, the city council passed an ordinance providing for employees of the health department of the city, and fixing their salaries; providing therein, among other things, for appointment by the board of health, subject to confirmation of the council, of a bacteriologist at a salary of \$75 per month, and defining his duties. The relator was thereupon appointed to that position by the board, and entered upon the discharge of his duties. Thereafter, in December, 1910, the city, by vote of its people, adopted a new charter which had shortly prior thereto been prepared and proposed by fifteen freeholders of the city elected for that purpose, in pursuance of art. 11, § 10, of the state constitution. This new charter purports to be the entire organic law of the city. It contains no provision whatever relating to boards of health, nor does it provide for the exercise of any powers by any of the city departments or boards of the nature of those pertaining to boards of health. Upon the new charter becoming effective as the organic law of the city, the mayor notified the relator that his services as bacteriologist were at an end. Since then he has been excluded from that employment and refused compensation therefor. His dismissal in this manner was made without any cause being assigned therefor and without any hearing being awarded him.

The relator rests his right of reinstatement upon certain provisions of the new charter which he insists continues the position of bacteriologist, and also continues his employment in that position, until removed for cause. One of the provisions so relied upon is as follows:

“Every ordinance and resolution in force at the time of the adoption of this charter, except in so far as it is inconsistent with this charter, shall continue in force, until amended or repealed.”

Another of the provisions relied upon is contained in the article relating to civil service, and is as follows:

“Section 53. . . . Employees within the scope of this

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article who are in office at the time of the adoption of this charter shall retain their positions, unless removed for cause. . . .”

We find no provisions in the new charter furnishing any more substantial support to appellant's contentions than these two. As to the first quoted provision, it seems inconceivable that an ordinance providing for employees of a department which has no existence under the new charter, can be considered as continuing in force by virtue of this provision. Clearly it is not consistent with any provision of that charter. It provides for something that has been in effect dispensed with by the new charter. The new charter being silent upon that subject, that function of government is thereby left to be controlled by the general state law which we have noticed. The provision contained in the civil service article in the new charter, is, if possible, of even less aid to the relator in his contentions, for clearly an employment in the department of the city government which has ceased to exist under the new charter, cannot be within the scope of the civil service article in that charter so as to continue such position in existence. The civil service article manifestly only relates to such positions existing under the old charter as continue to exist under the new charter. The position of bacteriologist is clearly not one of such positions. This court has many times noticed and followed the rule that a new law purporting to be the whole law upon the subject-matter of which it relates repeals a former general law on that subject, even though the new law contains no express repealing clause. *State v. Carbon Hill Coal Co.*, 4 Wash. 422, 30 Pac. 728; *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789, 999; *Leavitt v. Chambers*, 16 Wash. 353, 47 Pac. 755; *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749; *State ex. rel. Hammond v. Ross*, 39 Wash. 233, 81 Pac. 725; *Bradley Eng. & Mach. Co. v. Muzzy*, 54 Wash. 227, 103 Pac. 37.

It follows that, since the new charter was adopted as a

new and complete charter, and in no sense as an amendment of the old one, it thereby became the entire organic law of the city, and all the provisions of the old charter were thereby effectually repealed, although we do not find in the new charter any express repealing language directed against the old charter. As bearing more directly upon the contentions of appellant, and in support of the view that the position into which he seeks to be reinstated ceased to exist upon the adoption of the new charter, the following authorities may be noted: *People v. Blair*, 82 Ill. App. 570; *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993; *Butner v. Boifeuillet*, 100 Ga. 743, 28 S. E. 464; *State ex rel. Reiley v. Chatfield*, 71 Conn. 104, 40 Atl. 922; *Schmidt v. Lewis*, 63 N. J. Eq. 565, 52 Atl. 707.

Frank Hinman was made a defendant by the relator, and it is alleged in substance, that Hinman is now employed by the city as a bacteriologist; the object of the action being to cause his removal from that employment as well as the reinstatement of the relator therein. It is not alleged, however, by what authority Hinman was so employed. However, we need not inquire as to the legality of his employment. It might be argued that we must presume that he is employed by the board of health as organized under the general law. This, however, is of no moment in our present inquiry. Since we conclude that there does not now exist any board of health for the city of Spokane under its existing charter provisions, the relator can have no employment under such a board, since all charter provisions and ordinances relating thereto are abrogated by the adoption of the new charter, and that subject is now controlled by the general state law.

The judgment of the learned trial court is affirmed.

MOUNT and FULLERTON, JJ., concur.

GOSK, J. (dissenting).—The employment of the respondent Hinman as a bacteriologist to succeed the relator, in my opinion, precludes the respondents from asserting that the

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office does not exist under the new charter. I therefore dissent.

DUNBAR, C. J., concurs with GOSE, J.

[No. 9910. Department One. February 16, 1912.]

THE CITY OF SPOKANE, *Respondent*, v. A. A. KRAFT *et al.*,
Appellants.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—EXCESSIVE AND ARBITRARY APPORTIONMENT—ABUSE OF DISCRETION—REVIEW BY COURTS. While the courts will be slow to interfere with the discretion of eminent domain commissioners in fixing the limits of a special assessment district, yet an assessment will be set aside as arbitrary and an abuse of discretion, where one block was assessed for three times the depth of the block on the opposite side of the street, and twice the depth of other blocks on the same side of the street, in amounts proportionally greater, apparently merely because it was all owned by one person, and without any possible suggestion that, from its situation or the lay of the land, it would receive any greater benefit from the improvement.

SAME—REVIEW—DECISION—REMAND—NEW ASSESSMENT. Upon reversing on appeal the confirmation of an assessment for a local improvement on the ground that one block was arbitrarily assessed an excessive amount, an entirely new assessment will be ordered, inasmuch as the amount to be deducted from the property in question could not be assessed to other owners without a new notice of the increase.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered December 28, 1909, upon findings in favor of the plaintiff, upon confirming assessments for street improvements. Reversed.

Post, Avery & Higgins, for appellants.

A. M. Craven and Bruce Blake, for respondent.

PARKER, J.—Eminent domain commissioners of the city of Spokane levied assessments upon land and lots of A. A.

¹Reported in 121 Pac. 830.

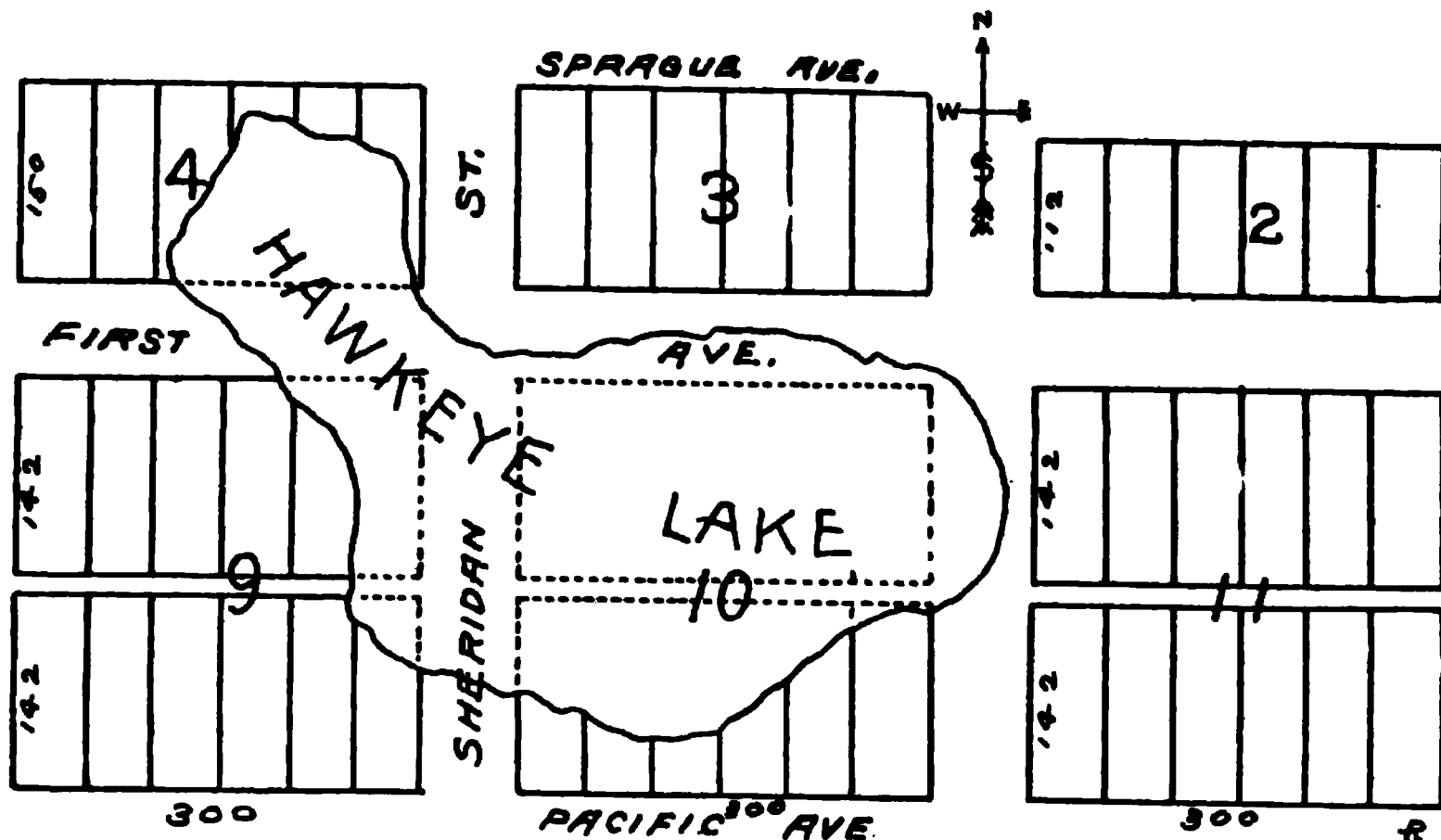
Kraft and wife, together with lots of other owners, to pay for land condemned by the city for extending First avenue and Sheridan street through an irregular tract of unplatted land surrounded by platted land within the city. There were two eminent domain proceedings, and two separate assessment rolls made, one relating to First avenue and one to Sheridan street. Kraft and wife objected to the assessment made against their property upon each roll. These objections were heard by the court, and evidence received relative thereto when the rolls were before the superior court for confirmation, and thereupon the court confirmed each roll as returned by the eminent domain commissioners, with very slight modifications. Kraft and wife have appealed from the judgments of confirmation. While there are two separate assessment proceedings involved in these appeals, and each must be determined by us upon its own merits, they are submitted here together, and involve facts some of which are common to both. Before discussing the assessments separately, we will notice these facts.

We may at the outset remark that the modifications of the assessments, made by the superior court upon confirmation, were so slight that we will regard such modifications of no consequence in determining these appeals. First avenue runs east and west, while Sheridan street runs north and south. These two eminent domain proceedings result in the avenue and street intersecting each other. The irregular tract of land through which the avenue and street are being extended lies at the intersection, and occupies a considerable portion of what would be three of the platted blocks cornering upon the intersection, if platted in conformity with the surrounding blocks and streets, and also occupies portions of the avenue and street extending a distance of from 200 to 300 feet east, west, and south from the intersection. This irregular tract is approximately three acres in extent, and has heretofore been known as Hawkeye Lake. It is a shallow depression in the ground containing water, and was left un-

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platted at the time of the platting of the surrounding land. The accompanying plat shows approximately the situation, and will render our discussion more readily intelligible.



The assessment district charged with the expense of extending First avenue through this irregular tract, includes the south half of blocks 2, 3, and 4, on the north side of First avenue, the north half of blocks 9 and 11, and all of block 10 on the south side of First avenue. Appellants are the owners of all of the fractional lots in block 10 fronting upon Pacific avenue, and all of the unplatted portion of block 10. It will thus be noticed that the assessment district extends north of First avenue one-half block, and extends south of First avenue so as to include the whole of block 10, but not the whole of blocks 9 and 11. In block 10, the district extends away from First avenue practically three times as far as it does in block 3 opposite. It also appears from the record that block 10 has charged against it an amount several times greater than is charged against the south half of block 3 opposite. Pacific avenue, which already furnishes an improved thoroughfare along the south front of block 10, suggests that there is no reason for assessing the south one-half of block 10 for the improvement of First avenue any more than

there would be for assessing any of the other half blocks situated equally distant from First avenue on the north or south. It is not contended that there is anything in the lay of the land which would suggest this discrimination. If the north half of block 3 or 4 does not receive any benefit from this extension of First avenue, it seems impossible to conceive how the south half of block 10 could receive such a benefit; indeed, the north half of blocks 3 and 4 are nearer to First avenue and the proposed improvement than the south half of block 10. This occurs by reason of the greater depth of block 10. It is apparent that, whatever reason there be for assessing to the middle of the blocks, on the north side of First avenue, would limit the assessment to the middle of the blocks on the south side of First avenue. The mere fact that all of block 10, including its unplatted portion, belongs to one owner within itself furnishes no reason for assessing it all as in this instance. It seems, however, from an examination of the evidence, that that fact largely influenced the commissioners in the making of the assessment in this manner. Appellants insist that the assessment of block 10 is so apparently without reference to the proportionate benefits resulting thereto as to call for reversal of the judgment of confirmation and a setting aside of the assessment. This challenges the discretion of the commissioners in fixing the boundaries of the assessment district, as well as in fixing the amount of the assessment against block 10; a discretion which, of course, we would be slow to interfere with. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *In re Third, Fourth and Fifth Avenues*, 55 Wash. 519, 104 Pac. 799.

We think, nevertheless, that the boundaries of this district have been thus fixed so arbitrarily without reference to the rights of the property owners as to amount to such an abuse of discretion on the part of the commissioners, and calls for a setting aside of the assessment and reversal of the judgment confirming it. These remarks also apply to the unequal apportioning of the assessment by the excessive charge against

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block 10 as compared with the other blocks. We would not be inclined to disturb the assessment merely on account of the inclusion of the south one-half of block 10 in the assessment if it appeared that the entire assessment upon block 10 was no greater than ought to be charged against the north one-half thereof, since that would not work an injustice to the owner of block 10, though upon demand they would probably be entitled to have the lien confined to the north half in view of the manner of assessing other blocks.

The assessment for the extension of Sheridan street through this unplatted land is in substantially the same condition as the assessment for the extension of First avenue, and the same contention is made against it by appellants. This assessment district includes the east half of blocks 4 and 9, the west one-half of block 3, and all of block 10 which is owned by appellants. As in the other assessment, block 10 is charged with an amount several times as great as is charged against the east one-half of block 9 opposite, and it will also be noticed that the east half of block 10 is assessed while the west one-half of block 9 is not. That is, the assessment district extends twice as far from Sheridan street, in block 10, as it does in any other part of the district. This we think was an arbitrary fixing of the assessment against block 10 and the boundaries of the district, amounting to an abuse of discretion for the same reason we have given relative to the other district. We conclude that the judgment confirming this assessment should be reversed, and the assessment set aside.

We are led to this conclusion concerning both assessments because there is necessarily involved here something more than the reducing of appellants' assessments. Unless the condemnation be abandoned, whatever is deducted from appellants' assessments must necessarily be charged against other benefited property or against the city, and other property cannot be assessed except by making new assessment rolls, after giving new notice to property owners, since other

property owners have had no notice that their assessments might be increased above that shown upon the original rolls. *In re Sixth Avenue West*, 59 Wash. 41, 109 Pac. 1052.

We have been careful to refrain from expressing an opinion as to just what the boundaries of the district should be, or what the amount of the assessment against appellants' property should be. What we have said only has reference to the comparative distances the boundaries of the districts have been placed from the streets being extended and the amount of appellants' assessments as compared with others. It may be that the boundaries of these districts should extend even farther away from these streets than the farthest boundary fixed by the commissioners in these instances. We are only holding that, in the fixing of such boundaries, there must not be unreasonable discrimination in favor of or against any particular property or the owners thereof. The fixing of the amount of the assessments must be governed by the same principle. We are not attempting to lay down any hard and fast rule. We fully realize that benefits can seldom be measured and apportioned with any great degree of exactness, but surely they can be apportioned more equitably than has been done in these cases.

Some contention is made in behalf of appellants that a portion of the expense of these improvements should have been assessed against the city. We find nothing in the record that would warrant our interfering with the assessments if that were the only objection made against them. We see no abuse of the commissioners' discretion in that regard.

We conclude that these assessments must be set aside, and the judgments of the court confirming them reversed; and in view of the fact that a new assessment upon a district with different boundaries will be necessary, the superior court is directed to cause the same to be made either by these or other commissioners appointed by it for that purpose.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

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[No. 9974. Department One. February 16, 1912.]

ELIAS ERICKSON, *Respondent*, v. WILLIAM COOK *et al.*,
Appellants.¹

SPECIFIC PERFORMANCE—ORAL CONTRACT—PAYMENT AND POSSESSION—EVIDENCE—SUFFICIENCY—DELAY—ESTOPPEL. While an executed oral contract for the sale of land must be proved by clear, cogent and convincing evidence, it need not be by direct testimony, especially when supplemented by the acts of the parties; and the evidence is sufficient to warrant specific performance, where it appears that, in 1902, plaintiff having orally purchased 1½ acres of wild land for \$30, taken possession, and fully paid for the same, the defendant in 1903 orally agreed to sell an adjoining 2½ acres at the same price, which is the tract in dispute, permitted the plaintiff to fully pay for the same in services, and tendered no deed of the first tract when paid for, nor any pay for services received, allowing plaintiff to expect one deed for the whole tract when fully paid up, that in 1905 the defendant reserved from another sale the 2½ acres, stating to the purchaser thereof that he had sold it to the plaintiff, that in 1910, the plaintiff took possession and started to clear the last tract, which adjoined and was in a sense part and parcel of the other, the land being wild and reducible to cultivation only by great effort; the defendant in such case being estopped to set up plaintiff's delay in demanding a deed or taking possession of the last tract.

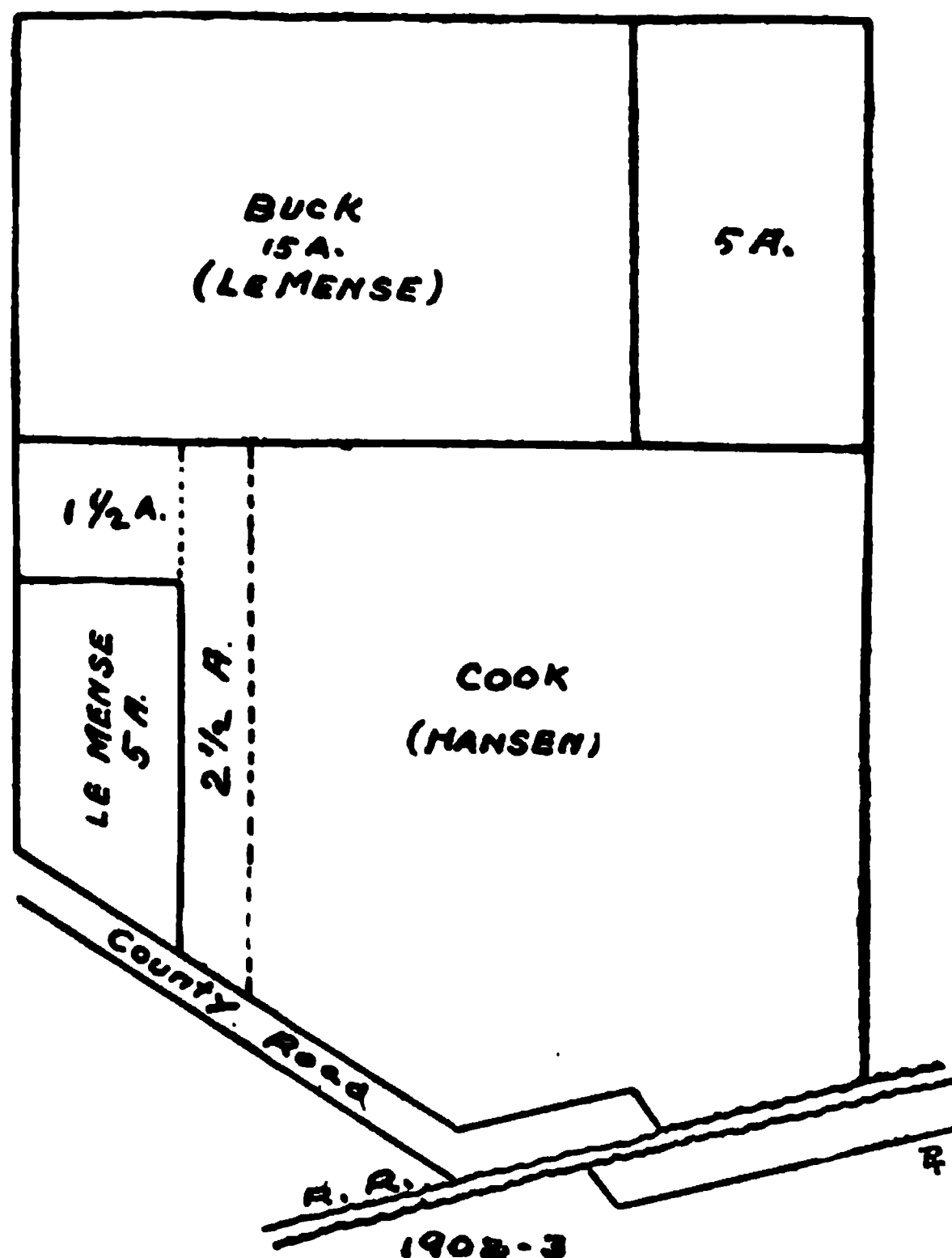
Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered May 8, 1911, upon findings in favor of the plaintiff, in an action for specific performance. Affirmed.

Faussett & Smith, for appellants.

E. P. Walker and Stiger & Dally, for respondent.

CHADWICK, J.—This is a suit for specific performance of an oral contract to convey land. That our argument may be the better understood, we reproduce a plat which shows the property involved and its relation to other properties coming from a common grantor.

¹Reported in 121 Pac. 825.



In the year 1902, plaintiff Erickson contracted with Cook, one of the defendants, for the one and a half-acre tract. He paid \$20 on the purchase price which was \$30, or \$20 an acre. We take it from the testimony that all of the land then owned by Cook was wild or brush land. Erickson says that, in 1903, Cook agreed to sell him the two and a half-acre tract at the same price. Between 1902 and the time this action was begun, in November, 1910, Erickson improved the one and a half-acre tract by fencing the whole piece and clearing and seeding one acre. He also built a house or shack. By mistake this was put over the line on the land marked "Buck," but now owned by defendant Le Mense. When the line was run out by a surveyor, the house was

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moved across the line. No improvement was made on the two and a half-acre tract, for some time. The year is not certain, but from the whole evidence it is most likely that it was in the year 1909, when Le Mense, who owned the Buck tract and who was desirous of connecting his two pieces of land, put in a roadway leading from the county road to his land-locked tract. This he did, after obtaining the consent of Erickson, whom he then believed to be, and recognized as, the owner. This was done after Erickson had refused to sell him the one and a half-acres or a way across it. Erickson also fenced in a small piece of the two and a half-acre tract, possibly a half acre, next to the road, which was cultivated in garden.

In the summer and fall of 1910, Erickson cut, slashed, and burned a part of the timber on the two and a half-acre tract, and while thus engaged, made demand on Cook for a deed. This being refused, this suit was begun. The day before the complaint was served, Cook and wife executed two deeds, one to Erickson for the one and a half-acre piece, and one to Le Mense for the two and one-half acres. He had sold the latter tract to Le Mense for \$225. These deeds were placed on record by Cook, without other delivery and at his expense. The fact of the sale to Le Mense being brought home to Erickson, he amended his complaint by bringing Le Mense and wife in as parties. It is not denied that, if he is right as to the amount of land he was to get, Erickson has paid the full purchase price in money and services. He worked for Cook off and on for several years, Cook keeping no account of what was his due; but he practically admits the receipt of the money and the rendition of services aggregating \$80 and more. On the part of Cook, it is contended that the only contract to convey he ever made with Erickson was for the one and a half-acre tract, and that he has performed this contract. Cook says that he had some talk with Erickson about the two and a half-acre tract, but only gave him a verbal option, "a first chance to purchase;" that no price was

ever fixed, and that he offered it to him before he sold to Le Mense; that the contract if made was void under the statute of frauds, and that there has been no performance which in law will relieve the transaction of the burden of the statute; that the improvements were made at a time so remote from the time of the alleged contract as to be without force to sustain it, and that they were so made without his knowledge and consent, and consequently against his will. Other defenses were urged which it is not necessary to mention or review.

Other facts are pertinent. In 1905 one Hansen began negotiations for the purchase of the tract marked "Cook" (Hansen). At the time, Hansen knew nothing of Erickson's deal for the two and one-half acres. Terms were arranged and the deed was to be executed on the next day. Afterwards Cook telephoned Hansen "that he had forgotten to mention that he had sold Erickson four acres, and if I [Hansen] wanted to accept the land and take that four acres out. I said, 'Yes.' " Cook does not deny this statement, but explains it, saying:

"At the time I had it on the market to sell to Mr. Hansen he [Erickson] wanted it. I told him [Hansen] I was going to reserve four acres, and so notified Mr. Hansen to that effect, that I had reserved four acres. Q. Why were you going to reserve four acres? A. Mr. Erickson said he would like to buy some more land. Q. He wanted to buy some more land? A. He said may be he would want to buy some more land. Q. Was there any talk at that time as to the consideration? A. No price was set. Q. That was to be determined when he got ready to buy the land? A. Yes. Q. In other words, you were to give him the first option in case you sold that two and a half acres? A. Yes."

In 1906, Le Mense bought the land marked "Buck" (Le Mense), for \$175, and ten or eleven years before the trial he bought the five-acre tract for \$90; and as heretofore stated, Erickson bought the one and a half-acre tract in 1902 for \$30. So that, if Erickson's theory is to be accepted, it will

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be seen that he agreed to pay a price that was fair at the time of the contract. Erickson is an old man, a native of Sweden, and does not read or write the English language. Moreover, Erickson was reputed to be the owner of the land in controversy as well as the one and one-half acres, and the fact that Cook was withholding the deed was a matter of comment and concern to the neighbors, some of whom believed that Cook intended "to beat him out of it;" for Erickson, because of his industry and reputed integrity, seems to have had the good opinion and sympathy of the whole neighborhood, even to the defendants Mr. and Mrs. Le Mense. From a decree in favor of the plaintiff, defendants have appealed.

It is well understood that contracts of the kind here relied upon must be proven with no ordinary degree of certainty. The proof to sustain them must be clear, cogent, and convincing. It is equally well settled that oral contracts for the conveyance of land must be sustained by proof that the quantity or boundaries of the land were understood, and the consideration for it must be proved with certainty or admitted; and further that there must have been performance, by taking possession and asserting ownership at the time, or within a reasonable time thereafter. These are the legal principles upon which appellants rely. They are elementary, and to avoid tedium in this opinion, we shall not cite either our own cases or the text books to sustain them. It does not follow that, because an oral contract must be so proved, the proof must be direct.

"An oral agreement that operates as a transfer of land must, of course, be made out by clear and satisfactory proof but it is not essential that it be established by direct evidence. If the facts and circumstances brought out are such as to raise a convincing implication that the contract was made and to satisfy the court of its terms, and that there would be no inequity in its enforcement, it is enough. *Anderson v. Anderson, supra*; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265. This is especially true where, as here, the parol evi-

dence is supplemented and supported by the acts of the parties." *Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396.

See, also, 36 Cyc. 690, 691.

We shall not rehearse the proof offered to sustain the contract, for reference to that which we have set forth in this opinion will carry conviction, as it did to the trial judge, that appellant Cook contracted to sell the two and a half-acre tract to Erickson; that the land was sufficiently identified at the time; or if not, it was thereafter so identified by Cook when he sold to Hansen as to estop him from now claiming that there was uncertainty on that score; that the consideration was agreed upon and has since been paid, and that Erickson has committed no act or omitted any duty that would make it inequitable to compel performance. We believe the contract was sufficiently proved.

Therefore, there are but two propositions remaining to be considered; the delay in asking for a deed, and delay in taking possession of the land. The testimony is somewhat conflicting as to the demand for a deed. Erickson says he asked for it several times. This Cook denies. It seems to us that Cook is in no position to complain of the delay on this account, although it be admitted that no demand was made until October, 1910. He admits that he never tendered a deed for the one and one-half acres, which were fully paid for in 1902 or 1903 at the latest. He permitted Erickson to work about his ranch, doing the chores and hauling wood, long after the price of the first tract had been worked out. He never offered to pay him anything; yet, if his present contention be accepted, he knew that Erickson was his creditor. That Erickson made no demand for money, coupled with the fact that Cook never offered to deed the one and a half-acre tract, convinces us that Erickson expected, and Cook by his conduct led him to believe, that he would receive one deed for the whole four acres. Possession of the two and a half-acre tract was in a sense delayed, but the time in which possession must be taken is a relative question. The property here in-

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volved was not a town lot or an open farm. Although in a well-settled community, it was wild land which, as the testimony shows, could not be reduced to cultivation without great effort and the expenditure of considerable money. The tract adjoins the one and a half-acre tract upon which Erickson was slowly digging out an acre of cleared land. It was in a way a part and parcel of it. He asserted ownership, was the reputed owner, and contracted with reference thereto. Some months or a year before this suit was brought, he fenced a part of the land and put it in cultivation. In measuring the equities in a case like this, this court can almost take judicial notice of the fact that wild or uncleared land cannot be taken possession of by men of small means with powder and donkey engine. Their work must follow the slower methods of the axe, the mattock, and burning. It may take months or years to clear a small tract of land, which until cleared would not even bear the cost of fencing which, under the rules of the common law, was the first and highest evidence of possession. Courts cannot make an inflexible rule in cases of this character. They must be made to rest upon the equities of the particular case. It is made to appear that a judgment for damages against Cook could not be collected under an execution. We find nothing that should deprive Erickson of the fruits of his contract. Cook has suffered no loss, nor has the delay worked to his disadvantage except that he has paid the taxes. Of this item, the testimony shows an offer to pay on the part of Erickson. This item should not be held as controlling, for the burden could have been put on Erickson at any time. While we do not admit that the testimony shows that there has been a great advance in the value of the land, for there is no testimony to show its present value, except the purchase by Le Mense, and it clearly appears that he bought under the stress of necessity; yet if it does, the fact that it was paid for by Erickson long before the sale to Le Mense would destroy

the effect of that testimony, should it be taken at its full value.

The judgment of the lower court is affirmed.

DUNBAR, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10013. Department One. February 20, 1912.]

HONORA BRENNAN, *Respondent*, v. BART HEALY, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. In an action for services as a trained nurse, the admission of irrelevant evidence as to articles furnished by the plaintiff is not prejudicial, where there was no evidence of their value and the instructions only permitted recovery for the reasonable value of the service.

APPEAL—REVIEW—VERDICT. A verdict will not be set aside as contrary to the evidence, or as excessive, where there was competent evidence to support it.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 4, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

E. C. Dailey, for appellant.

Hathaway & Alston, for respondent.

GOSE, J.—This is a suit upon an account for services rendered by the plaintiff as a trained nurse in nursing the defendant's wife and child. It is alleged in the complaint that she entered the service of the defendant as a trained nurse on the 13th day of September, 1909, at his request; that she continued in his service until the 4th day of May, 1910, and that her services were reasonably worth \$25 per week, making in the aggregate \$835.50. She prays a judgment for that amount. Issue is joined both upon the contract to render service and the reasonable value of the service. There was a

¹Reported in 121 Pac. 59.

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verdict and judgment for the plaintiff for \$500, from which the defendant prosecutes this appeal.

The errors assigned are, (1) that the court erred in admitting certain evidence; (2) that the verdict is contrary to the law and the evidence; and (3) that the verdict is excessive.

The court permitted the respondent to testify that she tore up certain articles of her clothing and used them in nursing the appellant's wife. This testimony was irrelevant and immaterial under the pleadings, but it does not follow that it was prejudicial. No evidence was offered as to the value of the articles. The court instructed the jury that, if they found that the services were performed at the request of the appellant, the respondent was entitled to recover the reasonable value thereof. There was no reference in the instructions to anything furnished by the respondent. We do not think the admission of the testimony was prejudicial.

The verdict was not contrary to the law and the evidence. Upon the evidence submitted, the jury might have found for either party and the verdict would have been supported by competent, substantial evidence. We are not concerned with the question of the preponderance of the evidence. That question was settled by the verdict of the jury.

Nor can we declare, as a matter of law, that the verdict was excessive. The evidence would have supported a verdict for the full amount claimed. The case presents a simple question of fact which the jury resolved against the appellant, and he must accept the verdict.

The judgment is affirmed.

DUNBAR, C. J., PARKER, CROW, and CHADWICK, JJ., concur.

[No. 10101. Department One. February 20, 1912.]

D. L. GOLDBACH *et al.*, *Appellants*, v. L. GAINES *et al.*,
Respondents.¹

BOUNDARIES—PLATS—CONSTRUCTION—LOCATION OF LINE. Where the northwest corner of a plat is 8¼ feet south of the government subdivision, and the northeast corner is 21.44 feet south of the same line, the true north line of the townsite is the north line of the north tier of blocks as actually marked on the plat and not the government subdivision line.

BOUNDARIES—AGREED LOCATION—EVIDENCE—SUFFICIENCY. It cannot be claimed that there was an agreed location of a boundary along a blazed line, where one of the parties refused to build a fence thereon until it was surveyed, and the other did not know exactly where the line was and agreed that the line was subject to survey.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 10, 1911, upon findings in favor of the defendants, in an action to establish a boundary line. Affirmed.

Milo A. Root, for appellants.

Wingate & Dolby, for respondents.

GOSE, J.—This is an action to establish the boundary line between the properties of the plaintiffs and the defendants. There was a judgment for the defendants. The plaintiffs have appealed.

The following is a summary of the facts: The town of Huron was platted in 1890 by the common grantors of the respective parties. The respondents' immediate grantors acquired title to their property in 1902. The appellants acquired title to their property in 1906. The respondents acquired title in 1909. The respective properties were described by metes and bounds in the deeds of conveyance. The deed, both to the respondents and their immediate grantors,

¹Reported in 121 Pac. 61.

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described their properties as "beginning at a point thirty feet south of the southwest corner of block 3, in the town of Huron, according to the plat of said town on record in the office of the auditor; thence east on a line parallel to the south line of said block 3," etc. The appellants' deed describes their land as "commencing at the southwest corner of the land of Abertel Ludington," she being the respondents' immediate grantor. The plat of the town of Huron as recorded shows the northwest corner of the platted land to be eight and one-fourth feet southerly of the government subdivision, and the northeast corner 21.44 feet south or southerly of the same line. The bone of contention between the parties, if we understand the testimony of the civil engineers, is whether the government subdivision line, or the north line of the north tier of blocks as actually marked on the plat, is the true north line of the townsite. The appellants contend for the former line, and the respondents for the latter. The court found in favor of the respondents. There is abundant testimony to support the finding. The engineer upon whose survey the appellants rely testified that his survey conformed to the old fence lines and to a blazed line between the properties of these parties. The line fixed by the trial court takes about three feet of the appellants' barn, and a private roadway and drainage ditch built and used in common by the parties. The judgment, however, provides for a permanent common user of the roadway and ditch, and enjoins the respondents from interfering with the land upon which the appellants' barn is located, so long as the barn remains thereon.

The land in dispute is a small wedge-shaped tract widening from west to east. The appellants contend (1) that a correct interpretation of the plat supports their contention, and (2) that the lines adopted by the respective parties and their grantors, as shown by the fences and blazed lines, should be held controlling. The first contention cannot be sustained. The civil engineers who testified in the case do not agree

upon that interpretation of the plat. It is significant, however, that the engineer who made the survey from which the plat was made testified that the lines as marked upon the plat conformed to the survey, and that the government subdivision was not the north line of the plat. This testimony harmonizes with the calls in the respondents' muniments of title. Upon this state of facts, we are not disposed to disturb the conclusion reached by the trial court.

Nor can we agree with the second contention. The appellant husband testified that he had a conversation with the respondent husband in the spring of 1909 about constructing a division fence in which the witness said: "I says, I don't want to fence until I get the place surveyed; that Ludington and I had often spoken about getting the line surveyed and we did not want to put any improvement like a permanent fence on the land without knowing that they were on the line." The appellant Mrs. Goldbach testified that: "Well, it was really understood that the line was about where we saw it blazed out. Mr. Goldbach showed me several times. We walked around there, and when any of us lived there we had in our mind about where the line was. We don't know just to the inch, but we agreed it was subject to survey. We agreed that whichever way the survey was made we would go by it." A witness who owned land adjoining the respondents' tract on the north testified that his fences were built with reference to the government subdivision; that he did not know whether they were on the true line, and that "I never had any idea about it, because I didn't know where the fences were. I don't think anybody else did until they had it surveyed. They were always talking about having it surveyed." A reading of this testimony makes it plain that the appellants cannot prevail upon the principle of estoppel, or upon the ground of an agreed boundary line which is but a form of estoppel. Their own testimony precludes the application of such a principle.

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The appellants have cited *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201. It is there held that, "where there is a discrepancy between the survey and the plat, the survey controls when it can be ascertained." This rule is well settled, but it affords no comfort to the appellants. In that case the lots as actually surveyed and marked on the ground did not conform to the recorded plat. In this case there is no evidence of any stakes or monuments to indicate where the actual survey was, unless we infer that the blazed line was intended to mark the course of the survey. The excerpted testimony shows that the parties in interest did not rely upon the blazed line as being the true line, and there is nothing to indicate the purpose of the blazing. While the fences seem to have been built with reference to the government subdivision upon the north as being the boundary line of the town plat, it is evident from the testimony of all the witnesses that they did not know the location of their boundary lines, and that they did not claim that their fences were upon the true line.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, PARKER, and CROW, JJ., concur.

[No. 9992. Department One. February 20, 1912.]

GOLDIE-KLENERT DISTRIBUTING COMPANY, *Appellant*, v.
 WILLIAM J. BOTHWELL, *Respondent*.¹

FRAUDS, STATUTE OF—ANSWERING FOR DEBT OF ANOTHER—INTEREST AS STOCKHOLDER. A promise by a promoter and principal stockholder in a corporation, that if a creditor would forego its demand for immediate payment for goods sold to the corporation and would continue to sell and deliver goods to it, he would pay the same and become responsible therefor and would "indemnify and hold harmless" the seller for any loss on account of the extension of credit or sale of goods to it, is a promise to answer for the debt or default of another, within the statute of frauds, Rem. & Bal. Code, § 5289, and void when not in writing; and it is immaterial that he is directly interested as a stockholder.

SAME—CONSTRUCTION—QUESTION FOR COURT. In such a case, the facts being admitted, the construction is one of law for the court.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 30, 1911, upon sustaining a demurrer to the complaint, dismissing an action on contract. Affirmed.

Wm. Parmelee, for appellant.

W. C. Edwards, for respondent.

Gose, J.—This is an appeal from a judgment of dismissal, entered after demurrer to the complaint had been sustained and after the plaintiff had refused to plead further. The complaint is of too great length to be set forth in full. In substance and effect, it alleges, that the appellant and the Luneta Cafe are corporations; that the respondent is a stockholder in the latter corporation; that he subscribed for its capital stock in an amount "in excess of \$20,000, which was not paid;" that he was the promoter and originator of the enterprise and the only person who has put any money into the corporation, and that "the same was virtually his own business;" that in November, 1910, the cafe, acting

¹Reported in 121 Pac. 60.

through its officers, purchased from the appellant goods, wares, and merchandise of the value of \$1,800, promising to pay cash therefor upon the delivery of the goods; that the appellant delivered the goods to it at its place of business in Seattle and demanded payment; that it was "unable" to pay; that the respondent then told the appellant that he was "virtually" the only person who had advanced any money to the cafe, and was the only responsible person connected with it; that it was "virtually" his business, but that owing to the fact that he was "comptroller" of the city and that the business of the cafe was that of selling intoxicating liquors and providing amusement and entertainment for its patrons, he did not, "for political reasons," desire to disclose his connection with it; that if the appellant would "forego its demand for cash with the goods then sold to it, and let the account run for a short time together with such other goods as said Luneta Cafe might order from plaintiff from time to time, that he, the said William J. Bothwell, it being his own enterprise and business, and he receiving the benefit thereof, would himself pay said debt of \$1,800, and such other subsequent accounts that might accrue from time to time. That owing to his holding public office he did not desire the goods charged to him, but the goods so sold by plaintiff to the Luneta Cafe and to be sold to the Luneta Cafe thereafter should be charged solely to the account of the said Luneta Cafe, and that he, the said Bothwell, would pay the same and become responsible therefor, and that he, the said Bothwell, would indemnify and hold harmless the said plaintiff from any loss on account of its extension of credit for goods sold and to be sold as aforesaid to the said Luneta Cafe, which said goods were to be charged on said plaintiff's books to said Cafe." It is further alleged that the appellant, relying upon "said promises and assurances and said indemnity," permitted the goods theretofore sold to the cafe to remain in its possession, and that subsequently for like reasons it sold

goods, wares, and merchandise to the cafe, amounting in all to \$2,628.40, and that the respondent has refused payment.

The single question presented by the appeal is, does the alleged promise of respondent fall within the statute of frauds. The code, Rem. & Bal., § 5289, provides, so far as pertinent to this question, that "every special promise to answer for the debt, default, or misdoing of another person," shall be void unless the contract or promise is in writing. Viewing the complaint as an entirety, without selecting particular words or phrases and giving them undue weight, prominence, or emphasis, we are of the opinion that the alleged promise offends the statute. The most favorable view that can be taken of the complaint is that the respondent represented that he was the largest stockholder in the corporation and the only one who had put money into it; that he was solicitous for its welfare and success; that for political reasons he desired to conceal his connection with it; that he was not one of its officers; that the first sale was made to it "through its officers;" that if the appellant would forego its demand for immediate payment of the first sale and delivery of goods, and would continue to sell and deliver goods to it, he would "pay," "become responsible for," and "indemnify and hold harmless" the appellant "from any loss on account of its extension of credit for goods sold and to be sold . . . to the said Luneta Cafe."

The true import and meaning of the complaint as an entirety, when stripped of its verbiage and simplified, is that the respondent induced the appellant to forego its demand upon the cafe for immediate payment of the first account and to extend it further credit upon his promise to indemnify it against loss. This is clearly a promise to answer for the debt of another. If I say to a coal dealer, "Deliver a load of coal to my neighbor A and I will pay for it," the debt is mine and the promise is not within the statute; but if I say to him, deliver the coal and "I will pay for it if he does not,"

or "I will guarantee the payment," or that I will "indemnify him against loss," or use equivalent words, the debt upon a delivery of the goods is not my debt; the promise is not direct, but collateral, and the contract or promise must be in writing. The courts are practically a unit upon the hypotheses stated. To state the matter in another form, a direct promise to pay for goods to be delivered to another upon the credit of the promisor is not within the statute, while a collateral promise is. *Burns v. Bradford-Kennedy Lum. Co.*, 61 Wash. 276, 112 Pac. 359; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529; *Wilkie v. Marshall*, 77 N. J. L. 272, 72 Atl. 30; *Miller v. Adams*, 142 Iowa 515, 119 N. W. 593.

Nor does the fact that the respondent was a stockholder in the corporation change the rule. The corporation is in law a separate and distinct entity. 10 Cyc. 650. But counsel says: "Whether the promise is original or collateral is generally a question for the jury under proper instructions of the court." This statement of the law would be correct if the one party asserted facts showing a direct promise to pay for goods to be delivered to another upon the credit of the promisor, and the latter asserted the fact to be that the sale had been made upon the credit of the party receiving the goods and that he had only promised to pay upon the default of the purchaser. The rule has no broader application. When the facts are admitted, the construction is one of law for the court.

If it be a fact that the respondent promised to pay the \$1,800 item if the appellant would leave the goods with the cafe and extend the time of payment of that account, and further promised to pay for such goods as the appellant might thereafter deliver to the cafe, and that it did extend the time of payment and made future deliveries to the cafe upon the credit of the respondent, the facts should have been pleaded in a plain and concise way. The circuitous method

adopted by the pleader indicates an effort to avoid a direct averment of these facts rather than to plead them.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, PARKER, and CROW, JJ., concur.

[No. 9486. Department Two. February 20, 1912.]

BREMERTON DEVELOPMENT COMPANY, *Respondent*, v. TITLE TRUST COMPANY, *Appellant*.¹

ABSTRACTS OF TITLE—MISTAKES—LIABILITY. The liability of an abstracter for want of care in making an abstract of title is contractual, and extends only to the employer.

SAME — OMISSIONS — LIABILITY — CERTIFICATE — CONSTRUCTION—ASSESSMENT LIENS. Where an abstracter, in extending an abstract prepared by another, certifies as to all city taxes and special assessments "due and unpaid against said premises," except taxes and special assessments, if any, shown by a previous certificate, the certificate must be construed to include all unpaid special assessments not referred to in the previous certificates, regardless of when they attached, as the previous certificate is thereby referred to and adopted, rendering the abstracter liable for omitting any reference to an unpaid assessment that became a lien prior to the time covered by the extension, which was negligently omitted from the certificate of the first abstracter.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 18, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for breach of contract. Affirmed.

Herr, Bayley, Wilson & Smith, for appellant.

Fred'k R. Burch, for respondent.

CROW, J.—The defendant Title Trust Company is a corporation engaged in the business of preparing, certifying, and selling abstracts of title. On or about June 8, 1910, the plaintiff, Bremerton Development Company, a corpora-

¹Reported in 121 Pac. 69.

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Opinion Per CROW, J.

tion, was considering the purchase of real estate in the city of Seattle, subject to existing liens. An abstract of title, prepared and certified by the defendant, was delivered to plaintiff. For the purpose of ascertaining all liens, and before agreeing to make the purchase, plaintiff employed and paid defendant to extend the abstract with a further certificate to June 10, 1910, which defendant did. Upon an examination of the abstract thus extended, plaintiff concluded to purchase the real estate, and accepted from the vendor a deed subject to all special assessments then liens, which plaintiff assumed and agreed to pay. Shortly thereafter, plaintiff discovered that a special improvement assessment levied by the city of Seattle was a valid lien and had been omitted from the abstract. Being compelled to pay the assessment, plaintiff commenced this action against the Title Trust Company to recover damages. From a judgment in plaintiff's favor, the defendant has appealed.

The record without dispute shows that the abstract had been previously certified to November 10, 1909; that on June 8, 1910, an extension certificate covering five additional sheets, including four instruments then attached, was made for a third party; that respondent employed appellant to again extend the abstract, which it did with a tax search and certificate to June 10, 1910. The last tax search and the certificate referring to all changes since November 9, 1909, read as follows:

"Tax Search.

"Search has been made for State, County and Municipal real property taxes due and unpaid against the premises described in the certificate hereto, as appears from the county rolls in the office of the County Treasurer of King County, State of Washington; also for City taxes and special assessments for street, sewer, parking, water-main, fire-hydrant and sidewalk improvements, due and unpaid against said premises (if the same lies within the present corporate limits of the City of Seattle, or of the City of Georgetown) as appears from the general and special assessment rolls in the office of the City Treasurer of said City. Taxes and special

assessments, if any, shown by a previous certificate are not referred to herein unless there has been some change by payment or otherwise since the date of said certificate.

“Taxes.

“The real property taxes for the year 1909 were paid by Max Ragley.

“Special Assessments.

“[Here follow statements on four separate special assessments, but no mention is made of the assessment of which complaint is now made.]

“Certificate.

“The Title Trust Company, a corporation, organized and existing under the laws of the State of Washington, hereby certifies that the foregoing five (5) sheets, consisting of four (4) instruments, show all matters that have been filed, or entered, upon the Official Records of King County, Washington, of the City of Seattle and of the Federal Courts holding sessions in said county, from the 10th day of November, 1909, at 8 o'clock a. m. to the date of this certificate, affecting the title to the following described premises, situate in the City of Seattle, County of King, State of Washington, to wit: . . . That the preceding sheet contains a correct statement of all real property taxes and special assessments against said premises since November 10, 1909, at 8 a. m., as shown by the tax records therein referred to.

“In testimony whereof, etc.”

Appellant contends that the trial court erred in denying its motions for a directed verdict and for judgment *non obstante veredicto*. It concedes that the special assessment lien was never shown or disclosed, but insists that the omission occurred in an earlier portion of the abstract prepared for other parties; that the assessment became a lien on February 20, 1908; that the certificate made for respondent only covered the period between November 9, 1909, and June 10, 1910; that no change other than those shown had occurred within that time; that the certificate was therefore truthful; that no omission or mistake was made by appellant in the performance of its contract with respondent; that appellant's liability, if any, would be to parties by whom it had been

previously employed; that, relative to the omitted assessment, no privity of contract existed between appellant and respondent, and that respondent is not entitled to recover.

An abstractor's liability for damages arising from negligence or want of due care in making an examination of records and in preparing an abstract of title is contractual. The weight of authority is that such liability extends only to the person by whom the abstractor was employed. There must be a contract or privity of contract to create the liability, as it does not originate in tort. 1 Cyc. 215; *Thomas v. Guarantee Title & Trust Co.*, 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210.

The only question before us is how the last tax search and certificate made by appellant under its contract of employment by respondent must be construed. Appellant frankly confesses that the local improvement assessment was omitted from the previous tax search and certificate of November 10, 1909, and concedes that the party who ordered and paid for that certificate could recover for damages resulting to him. Appellant, however, insists that such former omission cannot sustain respondent's action, which only involves, and must rest upon, the last extension from November 10, 1909, to June 10, 1910. The certificate which appellant prepared and delivered to respondent precludes it from interposing any such defense. It certified that search had been made for city taxes and special assessments *due and unpaid* against the real estate. It is conceded that a portion of this assessment was then past due as shown by assessment rolls in the office of the city treasurer. The tax search statement also recites that taxes and special assessments, if any, shown by a previous certificate, were not referred to unless some change had occurred. Construing the tax search statement and certificate together, it becomes apparent that an examiner was thereby advised that existing assessment liens not therein mentioned would be found by referring to preceding tax search statements and certificates. The language

used clearly indicates that the existence or nonexistence of assessment liens shown by previous searches and certificates continued as therein shown, subject only to subsequent changes in the last certificate mentioned. By this certificate, an examiner of the title was directly referred to the previous tax searches and certificates to ascertain existing liens, and he would be justified in concluding that no assessment liens existed other than those thus disclosed. It is apparent that the form of certificate used was adopted by appellant to avoid the necessity of repeating assessment liens disclosed by previous searches and still existing. By reference and adoption, the former certificates thus became part and parcel of the later certificate made for respondent. The simple facts are that, in previous tax searches and certificates, the appellant failed to disclose the assessment lien; that the last tax search and certificate made for respondent, by reference to the previous ones, repeated, continued, and extended that omission; that respondent, relying on the last certificate and the former ones to which it referred, assumed the lien without knowledge of its existence; that it has thereby been damaged; and that the damage was caused by the appellant's failure to properly make its tax search and prepare its certificate. Appellant's liability is one arising in contract.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and ELLIS, JJ., concur.

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Statement of Case.

[No. 9909. Department Two. February 20, 1912.]

THE CITY OF SEATTLE, *Respondent*, v. LYMAN HINCKLEY
et al., *Appellants*.¹

DEDICATION—BY ESTOPPEL AND USER—EVIDENCE — SUFFICIENCY — IMPLIED ACCEPTANCE. A dedication of a city street by estoppel and user is shown where it appears that the owner removed his fences from a strip thirty feet wide, stating that he was throwing it open to the public, in 1889, and deeded the same to the city in 1892, a sidewalk was constructed thereon, the street used by the public for twenty years, and referred to in partition deeds of the heirs as Galer street, and used as a boundary line; the long continued use by the public implying an acceptance by the city, although the deed was lost and the street was not worked.

ADVERSE POSSESSION — STREETS — PRESCRIPTION. Open, notorious, continuous and adverse use by the public of a strip of land thirty feet wide, generally known and used as a thoroughfare, negatives permissive use, and constitutes the same a street by prescription independently of dedication.

MUNICIPAL CORPORATIONS—STREETS—DEDICATION—ESTOPPEL—PAYMENT OF TAXES. The payment of taxes and local assessments upon a strip of land used adversely as a street, for the prescriptive period, under a dedication by estoppel and user, does not estop the city from claiming the same as a street by dedication and prescription.

SAME—ESTOPPEL—COURT PROCEEDINGS—VACATION OF STREETS. Nor would the city be estopped by the fact that the city attorney, out of an excess of caution, included a portion of the strip in condemnation proceedings for the widening of streets, where the claimants in no wise altered their position by reason of the condemnations; especially in view of Rem. & Bal. Code, § 7840, providing an exclusive method for the vacation of streets.

Appeal from a judgment of the superior court for King county, Arthur E. Griffin, Esq., judge *pro tempore*, entered September 12, 1911, upon findings in favor of the plaintiff, in an action to quiet title. Affirmed.

Peterson & Macbride, for appellants.

Scott Calhoun and *Howard M. Findley*, for respondent.

¹Reported in 121 Pac. 444.

ELLIS, J.—This action was brought by the city of Seattle to quiet title to a strip of land thirty feet wide, known as "Galer street," being the north thirty feet of lot 1, section 30, township 25, north, range 4, E. W. M. The complaint alleges that, for the past twenty years, this strip has been openly, continuously, adversely and uninterruptedly used and occupied, under a claim of right, as a public street by the city, its inhabitants and the public generally. These allegations were traversed by the answer, which also sets up matter in estoppel against the city. Upon the issues so framed, the cause was tried to the court and a decree entered establishing the right of the city to the strip in question for street purposes, whereupon this appeal was taken by the defendants.

The evidence introduced by the respondent city shows, that one T. D. Hinckley, father of the appellant Lyman Hinckley, prior to 1889, owned a tract of land including this strip; that in 1889 or 1890 he removed his fence from the strip and stated at the time that he was throwing it open to the public; that ever since that time fences have been maintained on both sides of the strip; that in July, 1889, the Union Water Company purchased from T. D. Hinckley and wife a strip of land 53 feet wide, south of and adjoining the strip in question, and afterwards erected a pumping station thereon and laid its water pipes in the Galer street strip here in question, claiming the right to do so by license from the city and without either permission or objection, but by mere acquiescence, so far as the record shows, on the part of T. D. Hinckley; that sometime prior to 1892, T. D. Hinckley and wife deeded the thirty-foot strip in question to the city for use as a public street; that soon after the strip was thrown open, a sidewalk was built along the south side thereof, apparently by Hinckley and the water company, and that the strip has ever since been known as Galer street, and has ever since been used by the public as a street and thoroughfare, very largely by pedestrians and to a considerable extent by

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teams; that the street was never graded or improved by the city, but there was some evidence tending to show that the sidewalk had been repaired by workmen in the city's employ. While there was no evidence that the city ever accepted the conveyance of this strip from T. D. Hinckley and wife, and the deed was never recorded, the admission that the deed was made is strong evidence of an intention on their part to dedicate the strip for use as a public street when it was thrown open. The evidence also shows that, on March 25, 1909, after the death of T. D. Hinckley, partition deeds of the land owned by him were made between his widow and children, among them the appellant Lyman Hinckley; that these deeds referred to this strip as Galer street, and the descriptions therein were made with reference to it as a boundary line of the land partitioned, and that the south line of this strip was designated in the deed to Lyman Hinckley as the south line of Galer street and the north line of the tract deeded to him. This Galer street strip was not included in the decree of distribution of the T. D. Hinckley estate, nor in any of the partition deeds. The strip of land here in question extends from Dexter avenue on the west to Westlake avenue on the east.

We are of the opinion that this evidence amply established a dedication of this strip of land to the public for use as a street by T. D. Hinckley and wife.

"In making a dedication, no particular formalities are necessary. The statute of frauds is not applicable in such cases, and therefore a deed or other instrument of writing is not necessary, though, of course, a dedication may be made by deed. The intention to make a dedication may be shown by particular acts of the owner, such as throwing open his land to public travel, or platting it and selling lots with reference to the plat, or acquiescing in or positively assenting to its use by the public, or, in short, by any act positively and unequivocally indicating such intention." *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446.

See, also, 13 Cyc. 473; 1 Elliott, Roads and Streets (3d ed.), §§ 137, 175; 3 Dillon, Municipal Corporations (5th ed.), § 1079; *Barclay v. Howell's Lessee*, 6 Pet. 498.

The evidence also shows a recognition of the dedication, and of the public right in the land dedicated, by the widow and heirs of T. D. Hinckley, including the appellant Lyman Hinckley. Their deeds given and received in partition recognize the strip as Galer street, and refer to its south line as a boundary of the land partitioned. *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242; *Buschmann v. St. Louis*, 121 Mo. 523, 26 S. W. 687. We are also of the opinion that the evidence shows such a general and long continued use by the public as to imply an acceptance of the dedication. That such an acceptance is sufficient without any formal act on the part of the city officials is sustained by both reason and authority.

“The ‘town, county or parish,’ using Professor Greenleaf’s terms, is represented by the town, county or parish officers, but the officers are not the corporation. The municipal corporation consists of the inhabitants and not the officers; the officers are, in truth, nothing more than the agents of the corporation. The inhabitants, therefore, stand to the officers as principals, and if the principals have, by their conduct, accepted the dedication, it is of no great importance that the agents have taken no action in the matter. The inhabitants of a locality having by long continued use treated the way as a public one, they make it such without the intervention of those who derive their authority from them. Creating towns, cities, and other public corporations, is ‘but the investing the people of the locality with the government thereof,’ and they may themselves exercise the powers of government of highways quite as effectually by continued use as by any other method.” 1 Elliott, Roads and Streets (3d ed.), p. 193, § 170.

See, also, 3 Dillon, Municipal Corporations (5th ed.), § 1086; 13 Cyc. 465.

“A dedication and acceptance may be implied from a general and long-continued use by the public as of right.” *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904.

In any event, this strip had become a public street by prescription independently of dedication. It had been used by

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the public generally as a street, and generally known as Galer street, for a period of twenty years. During all, or practically all, of that period, its boundaries were clearly defined by fences. The use was open, notorious, continuous and adverse. There is nothing in the record to indicate a merely permissive use. The fact that this strip of land was known generally as Galer street and used continuously as a thoroughfare negatives a merely permissive use by the public. Every element of right by adverse possession is present. *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 615; *Scheller v. Pierce County*, 55 Wash. 298, 104 Pac. 277; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; *Chicago v. Wright*, 69 Ill. 318.

It only remains to consider the claim of estoppel made by the appellants. This claim is based mainly upon the payment of taxes by the appellants, and those from whom they deraign title. According to the decided weight of authority, this is not sufficient to estop the city from claiming the strip in dispute as a public street. The right of the public to use the land as a street established by a continuous and uninterrupted use cannot be admitted away by the taxing officers.

"The rights of the public in a highway are not affected by the listing of the premises for taxes, or payment of taxes when assessed. It is not within the province of assessing or collecting officers to thus admit away the rights of the public." *Campau v. Detroit*, 104 Mich. 560, 62 N. W. 718.

"The payment of taxes assessed by the local authorities is evidence tending to defeat the presumption of a dedication. Elliott, Roads & S. p. 131; *Waggeman v. Village of North Peoria*, *supra*. It is, however, under most circumstances, a matter of but small probative force; and, if the land is in fact dedicated to the public for a highway, the fact that it has been taxed will not prevent the public from claiming the use of such land for a public road." *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. 601.

See, also, *Buschmann v. St. Louis*, and *Chicago v. Wright*, *supra*; *Lemon v. Hayden*, 13 Wis. 177; 1 Elliott, Roads and

Streets (3d ed.), § 198; *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549.

The same reasons apply to the further claim of appellants that the city was estopped to assert a right to this strip as a street by including it in a local assessment district and bringing an action in 1892 to foreclose an assessment thereon. The assessing officers could not thus admit away the public right then, and until now, exercised by a continuous and uninterrupted use.

It is also urged that the city is estopped by condemning a width of seven feet from the west end of this strip in widening Dexter avenue, and by condemning a part of the east end of this strip in widening Westlake avenue. The evidence as to these condemnations indicates that the assistant corporation counsel who represented the city therein then claimed that the city owned this strip, but in order to avoid any question as to the title to the widened streets, Dexter and Westlake avenues, which were being widened for immediate improvement, he included small parts of the thirty-foot strip in the condemnation, with other lands condemned admittedly belonging to the Hinckleys. This was evidently done out of an abundance of caution. The essential elements of estoppel are lacking. The act of condemning and paying for these parts of the strip in question did not tend to place the Hinckleys in a worse position than they otherwise would have been. There is no evidence that, acting upon the faith of a relinquishment by the city which it is claimed these condemnations showed, they expended any money or incurred any obligation that they would not otherwise have expended or incurred. They have, by reason of these condemnations, in nowise altered their position for the worse. Moreover, it was not within the power of the city officials to thus vacate a public highway however acquired.

"It is, also, contended by respondents that inasmuch as the city included within the ordinance of August 6, 1864, and the proceedings to condemn had thereunder, the property before

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dedicated, that the city is now estopped from asserting a claim under the prior dedication, and this too, though the property has at all times since 1859 been treated by all parties as a part of the wharf. Such results, we think, do not follow. We do not see how it is within the power of the city officials to thus vacate a public highway." *Moses v. St. Louis Sectional Dock Co., supra.*

This is especially true under the provisions of the statute of this state relative to the vacation of streets. Rem. & Bal. Code, § 7840, prescribes the manner in which streets or alleys may be vacated. We have repeatedly held that this statutory method of vacation is exclusive. *Heuston v. Tacoma, ante* p. 92, 120 Pac. 872; *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797.

While we do not hold that the abandonment of a street may not be asserted against a city where the acts of the city have been such that equity and good conscience would prevent a claim of the city to the contrary, and where persons acting upon the good faith of such acts have, with full acquiescence by the public, expended money in improvements upon the land, in an honest belief that it was not claimed as a street, we do hold that no such case is presented here.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 10059. Department One. February 20, 1912.]

ANNA D. FOLEY, *Respondent*, v. OBERLIN CONGREGATIONAL
CHURCH OF STEILACOOM, *Appellant*.¹

TAXATION—EXEMPTION—CHURCH PROPERTY—PARSONAGE—LOCATION—STATUTES—CONSTRUCTION. A parsonage and lot, some distance and separated from the church lot, is not exempt from taxation, under Rem. & Bal. Code, § 9098, exempting from taxation all churches supported by donation in which seats are free to all, and the grounds on which such churches are built, not exceeding 120x200 feet in quantity, "together with the parsonage thereon"; especially in view of the rule of strict construction of such exemptions.

TAXATION—TAX LIENS—CERTIFICATES—FORECLOSURE—VALIDITY—JURISDICTION—EXEMPT PROPERTY. A tax certificate for the year 1905, upon property which was exempt from taxation that year, is not void so as to furnish no jurisdiction for foreclosure, where the holder, as such, paid taxes for five subsequent years when the property was not exempt, and sought foreclosure of the certificate for the subsequent years, as valid liens; since the certificate was *prima facie* evidence that the property was subject to taxation in 1905, upon which the holder had a right to rely in paying subsequent taxes; the result of which was to transfer to her the county's tax liens for the subsequent years.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 20, 1911, in favor of the plaintiff, upon sustaining a demurrer to the answer, in an action to foreclose a tax lien. Reversed.

J. W. A. Nichols and *John A. Shackelford*, for appellant.

J. L. McMurray, *F. G. Remann*, and *A. B. Bell*, for respondent.

PARKER, J.—This is an action to foreclose general tax liens upon lots 3 and 4, in block 39, of Balch's Part of the town of Steilacoom. The plaintiff alleges, in substance, that she is the holder of a certificate of delinquency against the lots, issued on September 11, 1907, by the treasurer of Pierce county, for the sum of \$18.20, being the amount of

¹Reported in 121 Pac. 65.

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taxes then due and delinquent for the year 1905, including penalty and interest; and that she thereafter paid taxes upon the lots for the years 1906, 1907, 1908, 1909 and 1910, stating the amounts so paid, for all of which she prays foreclosure. The defendant filed its answer alleging, as an affirmative defense, the following:

"Comes now the Oberlin Congregational Church, and for its amended answer herein alleges:

"(1) That the defendant is now and for more than twenty years has been a corporation duly organized, existing and acting as a religious body, under and by virtue of the laws of the state of Washington, maintaining its church building and church services at Steilacoom, Washington; that said church was built and has been at all times and is now supported and maintained by donations and its church seats at all times have been and now are free to all.

"(2) That the property in this action sought to be subjected to the assessment levy and collection of taxes and to the lien of the tax certificate issued by Pierce county and now held by the plaintiff, is and during all the times herein mentioned has been the property of this defendant, and the property upon which is and during all said times has been located the parsonage of this defendant.

"(3) That said property, together with lot 5, block 4, Balch's Part of Steilacoom, is all the property owned by defendant, and that each of said lots are of the dimensions of 60 by 120 feet and the total area of said three lots does not exceed 120 by 200 feet in quantity.

"(4) That the church building of defendant is on lot 5, block 4, aforesaid, a separate tract, about one thousand feet from the said lots herein sought to be subjected to tax lien. And that all of said property is and at all times has been used wholly for church purposes and not otherwise.

"(5) That for the first year for which taxes are charged against said lots, to wit, the year 1905, the church building of defendant was located upon said lots, as well as said parsonage, whereby taxes for said year are unlawfully charged against said lots."

The plaintiff filed a general demurrer to this answer, alleging as the only ground thereof, that the answer does not

state facts constituting a defense. The court sustained the demurrer, and the defendant electing to not plead further, judgment of foreclosure was rendered in favor of the plaintiff as prayed for. The defendant has appealed.

It is first contended by counsel for appellant that the facts stated in its answer show that the lots are exempt from taxation during all the years for which foreclosure is sought, under § 9098, Rem. & Bal. Code, which provides among other things as follows:

"All property described in this section, to the extent herein limited, shall be exempt from taxation, that is to say:

"First. . . . all churches built and supported by donations whose seats are free to all, and the grounds whereon such churches are built, not exceeding one hundred and twenty feet by two hundred feet in quantity, together with the parsonage thereon: Provided, that such grounds are used wholly for church purposes and not otherwise."

This contention involves the single question, Does the fact that the lots here involved, on which the parsonage is situated, being entirely separated from the lot on which the church is situated, prevent the parsonage lots from being exempt from taxation as the church lot is exempt? It seems to us that a careful reading of this exemption statute can lead only to the conclusion that the parsonage must be situated upon the same lot or tract of land as the church, in order to escape taxation. It will be noticed that it is "the grounds whereon such churches are built" that are exempt, and it is "the parsonage thereon" that is exempt. No land is exempt save that on which the church is built. Surely a lot a thousand feet from the church cannot be said to form any part of the grounds on which the church is built. Such different lots or tracts could by no possibility touch each other, and hence a building on one could in no sense be said to be on both. It is plain that the ground on which a parsonage may be situated is not exempt because of the presence of the parsonage there, but because it is a part of the grounds on which the church is built. It is evident that the parsonage

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is mentioned in the statute to secure the exemption of the parsonage building, when situated on the church grounds, rather than to secure the exemption of the ground on which the parsonage is situated; since by the terms of the statute such grounds are exempt whether any parsonage is situated thereon or not. The case of *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252, is in harmony with this view. That case is also in point here as showing the adherence by this court to the rule of strict construction of statutes exempting property from taxation. At page 266, the court said:

“It is a well-settled rule that statutes exempting persons or property from taxation are to be strictly construed, and that exemptions are not to be extended by judicial construction to property other than that which is expressly designated by law.”

See, also, 1 Desty, Taxation, p. 108; 1 Cooley, Taxation (3d ed.), p. 357; *Bloomington Cemetery Ass'n v. People ex rel. Baldrige*, 170 Ill. 377, 48 N. E. 905; *County of Ramsey v. Church of the Good Shepherd*, 45 Minn. 229, 47 N. W. 783, 11 L. R. A. 175. We conclude that the lots here involved were not exempt from taxation after the church was removed therefrom.

It is next contended that, in any event, the answer shows that the lots were exempt from taxation for the year 1905 when the church was situated thereon; and that since the certificate of delinquency was issued only for the taxes for that year, it was void and furnishes no support for the foreclosure of taxes paid for subsequent years. We cannot agree with this contention. It seems a plain inference from the allegations made by respondent, that she paid the taxes for the years subsequent to those for 1905, as the holder of this tax certificate. The answer does not question the validity of these subsequent years' taxes, except upon the ground of exemption, which we have seen is untenable. So it is plain that all of the taxes for these subsequent years are valid liens upon

the lots, which of course can be foreclosed by the owner of such liens. Has the county transferred these liens to respondent by the issuance of this certificate of delinquency to her, and thereafter receiving from her these subsequent taxes as the holder of such certificate? It seems to us this inquiry must be answered in the affirmative. When this certificate was issued to respondent, it carried with it *prima facie* evidence that the property therein described was subject to taxation at the time it was assessed, by the express terms of § 9253, Rem. & Bal. Code. Respondent had a right to rely upon this presumption and to pay subsequent taxes as the holder of the certificate, with a view of foreclosing such taxes with the taxes of 1905 evidenced by the certificate. We think this certificate, and the subsequent payment of taxes by respondent as holder thereof, resulted in the tax liens all being transferred to her, even though the particular taxes of 1905 for which the certificate was issued are eventually proved to be invalid by reason of the lots being then exempt from taxation. This court has held that, when one in good faith pays taxes to protect what he believes to be a valid lien held by him upon land, he may enforce the lien of the taxes so paid, even though his supposed original lien proves to be of no avail to him. *Spokane v. Security Sav. Society*, 46 Wash. 150, 89 Pac. 466; *Childs v. Smith*, 51 Wash. 457, 99 Pac. 304, 130 Am. St. 1107; *Childs v. Smith*, 58 Wash. 148, 107 Pac. 1053.

It is true that in these cases the subsequent acquired tax liens were not sought to be enforced in statutory general tax foreclosure proceedings; but we are not able to see any substantial reason for denying the right to foreclose such subsequently acquired tax liens in a tax foreclosure where the original lien fails, any more than in other foreclosures. In this proceeding, the subsequent taxes were paid upon the faith of the original lien, just as the taxes were paid in the cases cited; and the subsequently paid taxes were, of course,

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subject to foreclosure in each instance, in the proceeding provided by law for the foreclosure of the original lien. The failure of the original lien surely cannot affect the right to foreclose for subsequently paid taxes, in the action brought to foreclose the original lien, any differently in one case than in the other. Our discussion has proceeded upon the assumption that the taxes of 1905 are invalid, if the allegation of the last paragraph of the answer is true, as to the church being then on the lots here involved. No argument is necessary to demonstrate the correctness of this assumption. A mere casual reading of the statute above quoted is sufficient for that purpose.

We conclude that the learned trial court erred in sustaining the general demurrer to the answer, since it stated, at least, a good defense to the foreclosure of the taxes for 1905, though it did not state a good defense to the foreclosure of the taxes paid by respondent for the subsequent years. The judgment is reversed, with instructions to overrule the demurrer to the answer, and for such further proceedings as are not inconsistent with this opinion.

DUNBAR, C. J., CROW, CHADWICK, and GOSE, JJ., concur.

[No. 10014. Department One. February 23, 1912.]

WILLIAM WHITFIELD, *Appellant*, v. NONPARIEL
CONSOLIDATED COPPER COMPANY, *Respondent*.¹

CORPORATIONS—CAPITAL STOCK—TRANSFER—RECORDING—NECESSITY—WRONGFULLY ISSUED STOCK—RIGHTS OF INNOCENT PURCHASERS. Under Rem. & Bal. Code, § 3693, providing that no transfer of corporate stock shall be valid except between the parties thereto until the same shall have been entered on the books of the company, a certificate for stock fair on its face, but wrongfully and fraudulently issued by officers of the corporation, is not valid or binding on the corporation in the hands of an innocent purchaser until it has been entered on the books of the company, the statute being for the protection of the company and the transfer of the stock being ineffectual until registered (Gose, J., dissenting).

CORPORATIONS — CAPITAL STOCK — WRONGFUL ISSUANCE—LIABILITY OF COMPANY—OFFICERS—PERSONAL DEALINGS. Where the president of a corporation, in order to secure his personal debt, turned over a certificate for corporate stock that he had wrongfully and fraudulently issued, the assignee has no claim against the corporation as an innocent holder, either to compel the transfer of the stock on the books of the company or for its value; the company not being liable for acts of its officers in dealing with stock for their personal benefit.

CORPORATIONS—CAPITAL STOCK—ACTIONS—CANCELLATION OF STOCK—PARTIES—INNOCENT HOLDERS. Under Rem. & Bal. Code, § 3693, making registration on the books of the company essential to a valid transfer of corporate stock except as between the parties, a purchaser of stock who allows several months to lapse before asserting any right to have the stock transferred is bound by a judgment, rendered in an action promptly brought by the corporation against the record owners of the stock, cancelling the same as fraudulently issued.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered September 29, 1911, upon an agreed statement of facts, dismissing an action to obtain title to corporate stock. Affirmed.

Padgett & Bell, for appellant.

J. A. Coleman, for respondent.

¹Reported in 123 Pac. 1078.

CHADWICK, J.—This action was brought, praying for a decree asserting that plaintiff is the owner of certain shares in the defendant company. Upon the trial, it developed that the stock claimed by him was overissued, and he asks damages to the extent of its value. From the agreed statement of facts, it appears that, on August 17, 1907, one Nicholas Rudebeck was president of the defendant company, and for the purpose of continuing himself in such office, wrongfully, and contrary to certain outstanding contracts and resolutions of the company, issued certificates for a large number of shares of the treasury stock, including a certificate to one R. H. Ramsey for 10,000 shares, of the par value of \$10,000. Ramsey's name was entered upon the books of the company as the owner of the certificate. After the stock had been issued, Rudebeck, who was owing plaintiff a certain sum of money, evidenced by a promissory note, to which was attached as collateral security a certificate for a certain number of shares in another company, went to plaintiff and made arrangements with him to turn over a certificate for 10,000 shares of the stock in the defendant company, in consideration of the surrender of his note and the collateral. He then procured the stock certificate that had been formally, as well as fraudulently, issued to Ramsey, which he caused Ramsey to indorse in blank, and this he turned over to plaintiff on August 21, 1907. Thereafter, the machinations of Rudebeck becoming known to those interested in the corporation, a suit was begun by R. S. McCreery, the principal stockholder, and the holder of a contract made by the company in which it was agreed that no further stock should be issued excepting under certain conditions, for the cancellation of the shares wrongfully issued by Rudebeck. Rudebeck and Ramsey, who appeared as owners of the stock upon the books of the company, were made parties to the suit. Neither McCreery nor the company had any notice or knowledge of the claims of the plaintiff or his alleged ownership. The court entered a decree,

directing that stock so issued by Rudebeck, including the Ramsey certificate, be canceled. Some few months thereafter, plaintiff presented his certificate and asked that it be transferred on the books of the company. This was several times refused, and he brought this action September 26, 1908. The only other fact that is material to a decision in this case is that it is provided on the face of the certificate that it is "transferable only on the books of the corporation or by the holder hereof, in person or by attorney, upon the surrender of this certificate properly indorsed." The court below entered a judgment that plaintiff take nothing, and that the certificate held by him be canceled.

It was contended in the court below, and is here:

"That the rule of law established by the decisions of the courts, and by the application of just principles is, that one who is the holder in good faith and for value of a certificate of stock, regular in form and issued and signed by the officers of a corporation who are authorized to sign and issue stock of such corporation by its by-laws, is entitled to be recognized as a stockholder and to have issued to him in his name the number of shares called for by the certificate upon surrender of the same and compliance with the by-laws of the corporation regulating the surrender and transfer of its capital stock; or, when the circumstances are such that such relief cannot be had, as in this case, then to be indemnified by way of damages, although the certificate of stock held by such person was fraudulently issued by the officers of the corporation. Stated in another form, the rule appellant contends for is that when a certificate of stock of a corporation has been issued in regular form by the proper officers of the corporation acting fraudulently, but within the apparent scope of their official powers, the corporation is estopped to assert that the stock is void as against a holder of such certificate who has acquired the same for value and without notice, that the same was issued and put into circulation by a course of conduct on the part of the officers of the corporation that was fraudulent as to the latter."

But it does not follow that a recovery can be had under the facts before us, when considered in the light of our stat-

ute governing transfers of stock. Shares of stock are but symbols of property. They may be assigned, but are not negotiable instruments. Such certificates are nonnegotiable, in the sense that a complete transfer of title, good as against the corporation, can only be made when the transfer is made in accordance with a governing statute. The general rule is that a stock certificate, fair on its face and issued by the officers thereof, is a continuing affirmation by the corporation of title and interest in the shareholder, and although wrongfully or fraudulently issued are, when in the hands of an innocent purchaser for value, valid and binding upon the company. 10 Cyc. 590. This rule had been long established when the legislature of this state passed the following statute:

“The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the numbers and designation of the shares, and the date of the transfer.” Rem. & Bal. Code, § 3693.

Therefore, we must hold that the statute was passed not only to avoid the effect of fraudulent assignments, but to relieve the corporation of the hardship of the rule just stated, as well as to protect it from liability from fraudulently issued stock. If this is not so, no purpose was served by its passage.

The case of *Davis v. Ball*, 64 Wash. 292, 116 Pac. 833, does not militate against our conclusion here. In that case no question was raised as to the transfer of the stock upon the books of the corporation. In fact, it was inferable from the record that the transfers of stock were actually made by a surrender of the original certificates and a reissue to the various holders.

The statute was considered in *Lacaff v. Dutch Miller Min. etc. Co.*, 31 Wash. 566, 72 Pac. 112. The court there said:

"This statute was, no doubt, intended to relieve a corporation from any liability whatever on account of the transfer of any of its shares of stock until it had had notice of the transfer, and had entered the same upon the books of the company. It, in effect, declares that all transfers of stock of the corporation are invalid, as between the company and the transferee, until such transfer shall have been entered upon the books of the company. If the transfer is invalid as between such transferee and the company, the transferee certainly cannot enforce such transfer against the company. Until the transfer is entered upon the books of the company there is no privity of contract existing between the transferee and the corporation which can be enforced by one against the other."

It is certainly within the power of the legislature to provide a time when the transfer of corporate shares shall become effective as against the company issuing them, and the statute by its plain implication, if not by its terms, has saved the right of the corporation to question the character of stock offered for transfer or registration. The *Lacaff* case has been followed in the recent case of *Gamble v. Dawson*, ante p. 72, 120 Pac. 1060, so that the rule seems to be settled, in this state at least, that a corporation unless estopped is not bound by a transfer of stock issued in fraud of its rights. The case of *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.*, 6 Wash. 597, 34 Pac. 155, is not in conflict with our present ruling. In that case the questions involved were wholly between the stockholder, his pledgee, and his creditor. The rights and interests of the company were not involved. The statute here construed was passed for the benefit and protection of the corporation and its creditors (*Van Horn v. New Western Shingle Co.*, 54 Wash. 117, 103 Pac. 42), and it conclusively appearing that respondent has not waived the benefit of the statute, it is entitled to its protection.

The agreed statement of facts raises another issue of law which must be decided in favor of the respondent. Admitting the legal position assumed by appellant, we think the

facts clearly show that appellant dealt with Rudebeck not as an agent of the corporation, but personally. The object of their negotiations was not for the purchase or sale of the stock directly or indirectly, but the payment or conservation of a personal debt. The ground upon which companies are held under appellant's contention is that of actionable negligence. In the case of *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 42 N. E. 988, 51 Am. St. 700, 710, 31 L. R. A. 779, the court quoted, as a perspicuous statement of the principle, the words of Blackburn, J., in *Swan v. N. B. Australian Co.*, 2 Hurl. & C. 181:

"The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

In *Manhattan Life Ins. Co. v. Forty-Second St. etc. R. Co.*, 139 N. Y. 146, 34 N. E. 776; *Id.*, 19 N. Y. Supp. 90, the president of a domestic corporation forged a certificate for one hundred shares of the face value of \$10,000, and pledged it as collateral security for a personal loan. In a suit to recover, although it was held that the party forging the stock was not the president of the company in 1881, the date imposed on the certificate, the court recognized the general principle, saying:

"But, without determining what are the duties of the officers of a corporation, when called upon to respond to the inquiries of intending purchasers of the stock, there is a sufficient reason why the plaintiff cannot avail himself of the representations of Allen in regard to the genuineness of this certificate. They were made in a private and personal transaction, undertaken for his individual benefit, and so understood by the plaintiff. The plaintiff knew that Allen, in the negotiation of the loan, was not acting as the officer or

agent of the defendant, or in its behalf, and that his personal interest in the transaction might lead him to betray his principal. It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest. . . . The plaintiff in such a case assumes the risk of the agent's disloyalty to his trust, and has no occasion for surprise when he discovers that the agent has served himself more faithfully than his principal."

In *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, A. loaned money to B. for his own use, and as security for its repayment and on his false representation that he owned and had transferred to A. a certificate of stock to an equal amount in a national bank of which B. was cashier, received from him such certificate written by him on one of the printed forms which the president had signed and left with him to be used if needed in the president's absence, and certifying that A. was the owner of that amount of stock "transferable only on the books of the bank on the surrender of this certificate." B. did not surrender any certificate to the bank, or make any transfer to A. upon its books, never repaid the money loaned, and was insolvent. The bank never ratified or received any benefit from the transaction. It was contended, there as here, that "the defendant is estopped to deny, as against a *bona fide* purchaser for value, the validity of such a certificate, if it was not an overissue; and if it was an overissue, the defendant is responsible for the loss sustained by such a *bona fide* purchaser for value." After reviewing the authorities, it was held that, "there is no precedent for holding that the plaintiff, having dealt with the cashier individually, lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrender of the former certificates, and no certificates having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the trans-

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action, can recover from the bank for the value of the certificate delivered to her by its cashier." See, also, *Wright's Appeal*, 99 Pa. St. 425.

Reference to these authorities will show that it is well settled that one who deals with an apparent agent with reference to his private affairs cannot hold a company to an estoppel, but must look to one who has wronged him; for his debt is not thereby discharged, but continues. We take it from the judgment of the court that he also held that plaintiff was bound by the judgment in the McCreery suit; and on principle it should be so. Those interested in the company acted promptly when the fraud of Rudebeck was discovered. They brought suit against all those who appeared to be the owners of the stock. It is one of the objects of the statute providing for transfer of stock on the books of the company that it may know its own shareholders; and if a suit is begun and the apparent shareholder be made a party, the suit should be binding upon all claiming an interest in the shares, where they have—as plaintiff in this case did—allowed several months to lapse before asserting any right to have the stock transferred.

The rule is old and well established that, where a party brings an action against the record owner of property, and there be no evidence of possession in any one other than as shown by the record, the holder of an outstanding deed or other muniment of title is bound by the judgment. The judgment of the lower court is affirmed.

DUNBAR, C. J., PARKER, and CROW, JJ., concur.

GOSE, J. (dissenting)—I do not think the statute was intended to shield this corporation against the fraud of its officers. For this reason and on the authority of *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833, I dissent from the view expressed by the majority.

[No. 9958. Department Two. February 24, 1912.]

MARY M. MILLER AND SONS, *Respondent*, v.
ALFRED J. SIMMONS *et al.*, *Appellants*.¹

ADVERSE POSSESSION—COLOR OF TITLE—VOID ADMINISTRATOR'S DEED. Actual possession under an administrator's deed for twenty-seven years is sufficient to bar an action by heirs to quiet title, brought when the youngest heir was 38 years of age, and regardless of the validity of the deed, as the deed, if void, was color of title.

CORPORATIONS — ACTIONS — CONDITIONS PRECEDENT — PAYMENT OF LICENSE—PROOF. Rem. & Bal. Code, § 3715, providing that the certificate of the secretary of state shall be *prima facie* evidence of the payment of annual license fees, made a condition precedent to an action by a corporation, does not make the certificate the only competent proof, and the payment may be established by the evidence of the officer making the same.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered April 26, 1911, upon findings in favor of the plaintiff, in an action to quiet title. Affirmed.

P. P. Carroll and *J. E. Carroll*, for appellants.

Tucker & Hyland, for respondent.

MORRIS, J.—Respondent is a corporation, and brought this action to quiet its title to lands in Kitsap county, and to enjoin appellants from cutting timber and committing other acts of trespass thereon. Appellants answered, denying title in respondent and asserting title in themselves as heirs of Charles L. Simmons and Louisa D. Simmons, father and mother of appellants, in whom it is alleged the title to these lands rested at the time of their respective deaths, prior to September 2, 1879, and attacking the validity of the probate proceedings in the estate of Charles L. Simmons, through which respondent claimed title. Respondent made reply to the affirmative defenses set up in the answer, pleading as *res adjudicata* a judgment in an action between the same parties,

¹Reported in 121 Pac. 462.

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upon the same issues, in which respondent's title was quieted to lands in Chehalis county; adverse possession, laches, and various statutes of limitations. It also asserted the regularity and validity of the probate proceedings in the estate of Charles L. Simmons. The lower court sustained all of respondent's contentions, and this appeal is taken from its decree.

The conclusion we have reached renders it unnecessary to refer to all the facts questioned by appellants, since they play but little part in the determination of this appeal. In a general way, the history of the case is this: Charles L. Simmons, a white man, was possessed of these lands, for many years prior to his death, intestate, September 2, 1879. Louisa D. Simmons was a full-blooded Indian woman, who died intestate June 15, 1876. The record is silent as to the relation of these parties, other than that they lived together as husband and wife. On June 10, 1875, Charles L. Simmons executed a mortgage on the Kitsap county lands to W. W. Miller for \$450, which mortgage and the note thereby secured were wholly unpaid at the time of Charles L. Simmons' death. Upon said death, William D. Baker was appointed administrator of the estate, and qualified as such. Mary M. Miller, having become the owner of this note and mortgage by assignment, presented her claim to Baker as administrator, and the same was allowed and approved. The personal property being insufficient to pay debts, application was made for a sale of real property, and on June 14, 1880, an order of sale was entered in the probate proceedings, and on November 1, 1881, upon due notice, the land was sold and Mary M. Miller became the purchaser. The sale was confirmed January 22, 1883, and on March 31, 1883, the administrator made his deed and delivered the same to Mary M. Miller, and the same was subsequently placed of record.

At the time the probate court made its order of sale, a guardian *ad litem* was appointed for these appellants.

Mary M. Miller took actual possession of the land in 1887, and so remained until October 24, 1894, when she passed the title to respondent, and said possession has since been maintained by it; respondent and its grantor, Mary M. Miller, having paid all taxes assessed against the property up to the time of the commencement of this suit. It is apparent that these facts in law are a sufficient answer to any contention of appellants as to the insufficiency or invalidity of the probate proceedings. The deed from the administrator to Mary M. Miller was given in 1883. It is not attacked until the commencement of this action in 1910, the youngest of the appellants then being thirty-eight years of age. Twenty-seven years would put in full operation every statute of limitations affecting actions of this character, irrespective of the character and effect of the administrator's deed; as it has been the universal holding of this court that a void deed is color of title, starting the running of the statute of limitations. *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; *Philadelphia Mortgage & Trust Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501; *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084, 126 Am. St. 921; *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166; *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fish v. Fear*, 64 Wash. 414, 116 Pac. 1083; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63.

This ruling being controlling upon the rights of the parties, no further attention need be paid to the numerous assignments of error, save one, in which respondent's capacity to maintain this action is questioned. Rem. & Bal. Code, § 3715, provides that no corporation shall be permitted to commence or maintain any action in the courts of this state, without alleging and proving the payment of its annual license fee last due, and that a certificate of such payment under the seal of the secretary of state shall be *prima facie* evidence of such payment. In its complaint respondent alleged the payment of its license fee for the current year. Upon the trial, the

secretary and manager of respondent testified that its license fees had all been paid. Counsel for appellants contends the payment could only be proved by the production of a certificate from the secretary of state. There is no merit in such a contention. The provision of the statute that the certificate of the secretary of state shall be *prima facie* proof cannot be construed to mean that such certificate is the only competent proof. Such a payment, like any other payment, may be established by direct evidence of the person making the payment. It is to be further noted that the paragraph of the complaint alleging such payment is not denied in the answer. It was therefore not an issuable fact in the case requiring proof. *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

[No. 9859. Department Two. February 24, 1912.]

KITSAP COUNTY TRANSPORTATION COMPANY, *Appellant*, v.
PACIFIC COAST CASUALTY COMPANY, *Respondent*.¹

INSURANCE—CASUALTY INSURANCE—ACTION—DEFENSES TO POLICY—AGREEMENT TO MAKE DEFENSE—INDEMNITY—DILIGENCE. In an action on a policy of casualty insurance, the assured is not entitled to show that, after giving notice of the accident, the company agreed to defend and the assured was injured in making its defense by being lulled into a feeling of security, where the assured entered appearance November 12, was informed before November 25 that the company would not make the defense, the trial took place the following July, and it did not appear that the assured used any diligence in preparing the defense, or that it was prevented from doing so by any act of the company.

SAME—POLICY—WAIVER OF PROVISIONS — EVIDENCE — SUFFICIENCY. There is no evidence that a casualty insurance company waived the provisions of a policy exempting it from liability in case of accident to a passenger on a boat, where the policy provided that none of its

¹Reported in 121 Pac. 457.

provisions could be waived except by written consent of an officer, and the alleged waiver was merely the statement of a local agent that he had a personal letter from an officer saying that they would take charge of the case.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 1, 1911, upon the verdict of a jury rendered in favor of the defendant, in an action on a policy of indemnity insurance. Affirmed.

Bamford A. Robb, for appellant.

Munn & Brackett, for respondent.

MORRIS, J.—Appellant seeks in this action to recover upon a policy of casualty insurance issued by respondent, covering the steamer Reliance, owned and operated by appellant. It is alleged that, on June 27, 1907, Peter P. Juul received certain injuries on the steamer Reliance, and while he was not a passenger, it being admitted that the policy did not cover injuries to passengers; that appellant immediately notified respondent of the accident, and the probable claim for compensation by Juul; that respondent agreed to investigate the claim and take charge of any litigation that might arise; that thereafter Juul commenced his action, and appellant delivered the complaint to respondent and requested it to conduct the defense under the policy; that respondent agreed to do so, but subsequently declined to proceed with the defense of the action upon the ground that Juul was a passenger at the time of the accident, and therefore not within the terms of the policy; that it was then agreed between appellant and respondent that appellant would defend the action without prejudice to its rights under the policy, and without in any way waiving its claim that Juul was not a passenger at the time of his injury, and that it did so defend; and judgment was entered against it for \$3,000 and costs, which judgment was subsequently affirmed on appeal to this court. It then set up its necessary expense in defending the action, which amount, together with the amount of the Juul judgment, it

sought to recover. Respondent denied any agreement to conduct the litigation, denied the further agreement pleaded by appellant under which it undertook the defense of the action; and pleaded affirmatively that, at the time of the accident, Juul was a passenger, and any liability to him was not covered by the policy. The result of the action was a verdict for respondent, and this appeal.

Upon the trial, appellant contended its right to recover upon two theories: (1) That the respondent agreed to conduct the litigation that might arise from the Juul accident, and waived any question as to whether or not he was a passenger; (2) that Juul was not a passenger and that, under the agreement, the judgment obtained by him upon the theory that he was a passenger did not, as between the parties hereto, determine the question. All of the assignments of error grow out of the lower court's treatment of the first theory, and are addressed to the refusal to permit certain testimony and the instructions given and refused. While the manager of appellant was giving testimony, he was asked this question: "What did you do personally about the Juul case between the time you submitted your report of the accident and the time that the suit was brought?" to which objection was made and sustained. Counsel for appellant then offered to prove that, relying upon representations and waivers of the casualty company, and believing that it was taking care of the matter, appellant neglected to look after the case. This offer was refused. The witness was then asked: "State whether or not, after your report of the accident and after your conversation with Mr. Caesar (agent of respondent), in which he said the Pacific Coast Casualty Company would take care of the case, you did anything further in regard to the Juul claim for damages?" Objection was made and sustained to this question, whereupon appellant offered to prove that, relying upon statements of the casualty company that it would take charge of the case, the appellant was lulled into a feeling of security in regard to the case,

whereby it was injured and prevented from properly defending the Juul case, which offer was denied.

These rulings are assigned as error. We do not so regard them. Appellant could not establish its right of recovery in this case by proving its neglect in the first case, nor could it prove it suffered in its defense in the first case by its assertion that it was prevented from properly defending the first case, without offering evidence of some facts upon which such conclusions might be predicated. There was no attempt to show it lost a favorable settlement of the case, or was unable to produce all the testimony existing in support of its defense, or its inability to produce any material witness, or any defense in law or fact it lost the benefit of because of its reliance upon respondent's promise to defend. There was no showing of any fact from which it could be concluded that its conduct of the defense in the Juul case would have been any different from what it was, or that there were existing facts it might have made use of that would have aided in its defense. Without some proof of these or other like facts, the court was justified in refusing to permit it to give the jury its conclusion that it suffered any injury. Appellant entered its appearance in the Juul case on November 12, 1907. Some time between that date and November 25 it knew respondent would not undertake the defense. The trial of the case took place the following July. There was nothing to show that this was not ample time in which to obtain all the facts upon which a defense might be based, or that appellant could have done anything it did not do in support of its defense of the Juul action. If it did not act diligently in that defense, it could not transfer the result of its lack of diligence to respondent. So long as it undertook the defense of the case, knowing from its last agreement with respondent that the cost of such expense and any adverse judgment obtained would be a liability upon one or the other, as it might be determined whether or not the accident was within the terms of the policy, it was its duty to proceed

with all diligence, and present every defense in fact and in law which the circumstances would permit. And until it appeared that appellant was, by the conduct of respondent, prevented from doing so, it was not competent for it to tell the jury it was injured and prejudiced in its defense.

The next error is the court's instruction that there was no evidence that the casualty company had waived the provision of the policy which exempted it from loss in case of injury to a passenger. We can find no evidence of any such waiver. It was provided in the policy that none of its provisions could be waived or altered except by written consent of an officer of the company. The testimony upon which appellant relies to bring it within this provision of the policy, and establish its claim of error, is that of its manager, who stated that he had a conversation with Mr. Caesar, one of the Seattle agents of the casualty company, in which Mr. Caesar "stated that he had a letter from an official of the company, or a party connected with the company in San Francisco, which he had in his pocket. I did not read the letter, but he quoted from the letter that he had, in which he stated that they would take charge of the case without the establishment of a precedent to control future cases." Appellant says in its brief, "this was certainly a written consent of an officer of the company waiving the provisions of the policy." We cannot so hold. It was nothing more than hearsay evidence of the contents of a letter. We quote further from the testimony on this point:

"He (Mr. Caesar) said it was from an official of the company, a friend of his; that it was a personal letter. Q. Did he say what official? A. He did not; he did not say what position the gentleman had. Q. Did he tell you he was an officer? A. I do not recollect."

This was altogether too vague and indefinite, if it could be classed as testimony at all, upon which to base a finding that some officer of the respondent had in writing waived the provision of the policy as to passengers. Appellant says *Staats*

v. Pioneer Ins. Ass'n, 55 Wash. 51, 104 Pac. 185, supports its contention upon this point. We cannot so read it. The *Staats* case holds that an adjuster of an insurance company may waive formal proofs of loss; that the insurance company, having sent him as its agent for the particular purpose of settling the loss, has thereby clothed him with authority to bind the company by his representations and agreements affecting the loss. We have no such facts here. It is not contended that Mr. Caesar waived the provisions of the policy, or that he had any authority to do so. The contention of waiver is based wholly on the conversation regarding the contents of the letter, which establishes neither a waiver nor any connection between what is urged as a waiver with any authorized official of the casualty company.

Some objection is made to the instructions of the court. We can find no error in them, nor in the refusal to give those requested. The instructions covered every phase of the case submitted to the jury with clear and concise statements of the law applicable thereto. While it is not our province to pass upon the facts of the case, having read the record in connection with the assignments of error, we cannot conceive how any other conclusion could have been reached by the jury without doing violence to the evidence.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and ELLIS, JJ., concur.

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Opinion Per ELLIS, J.

[No. 10009. Department Two. February 24, 1912.]

CATHERINE MCGILL, *Respondent*, v. HENRY MCGILL,
Appellant.¹

DIVORCE—ALIMONY—ENFORCEMENT—CONTEMPT PROCEEDING—TITLE—PARTIES. A proceeding to enforce a decree for alimony by means of notice and commitment for contempt in case of default, is not an independent contempt proceeding to be prosecuted in the name of the state, but is properly entitled in the divorce case.

SAME—REMARRIAGE OF PLAINTIFF—PARTIES. The remarriage of the wife does not prevent the enforcement of a decree for alimony.

SAME—SUPPORT OF CHILD—REMARRIAGE OF PLAINTIFF—EFFECT. The fact that, on remarriage, the wife's husband assumed the custody and support of a child, is no answer to contempt proceedings to enforce the payment of alimony awarded to the wife for such support.

Appeal from an order of the superior court for King county, Frater, J., entered July 10, 1911, requiring the payment of alimony awarded in a decree of divorce. Affirmed.

Herbert E. Snook, for appellant.

Rosenthal & Aaron, for respondent.

ELLIS, J.—This is an appeal from an order requiring the defendant to pay delinquent installments of alimony, awarded to plaintiff for the support of a minor child, by a decree of divorce, within ten days, failing which he stand committed to the county jail as for contempt. The defendant appeared specially and moved the court to quash the proceeding upon two grounds.

(1) It is urged that the proceeding, being for a contempt, could, under Rem. & Bal. Code, § 1054, be prosecuted only in the name of the state. It is a sufficient answer to say that this is not a proceeding for an independent contempt such as contemplated by the statute. The statutory proceeding is, in its nature, an original criminal proceeding, in which the

¹Reported in 121 Pac. 469.

sole subject of inquiry is the contemptuous conduct charged. The proceeding here arose in the exercise of the inherent power of a court of equity to enforce its decrees. It was in aid of the jurisdiction acquired in the original action, which continues so long as there is a minor child whose maintenance was provided for in the decree. The proceeding was, therefore, properly entitled as in the original action to which it is referable for the court's jurisdiction. This is no longer an open question. *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634; Rem. & Bal. Code, § 989.

(2) The second contention is that the proceeding should be dismissed because, the plaintiff having remarried, there is now no such person as the plaintiff named. There is no merit in this contention. The cases above cited effectually dispose of it as they do of the first. The motion to quash was properly denied.

(3) On the merits, the defendant answered that the present husband of the plaintiff had voluntarily assumed the support of the child, and stood in *loco parentis*; that the purpose of the decree was thus met and the defendant thus absolved from its further observance. The solemn decrees of courts are not to be discharged in any such fortuitous fashion. We cannot recognize charity, however willingly bestowed, as a legal substitute for the natural duty of a parent to maintain his minor child. The court correctly held that the answer stated no defense.

The order is affirmed.

DUNBAR, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.

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Statement of Case.

[No. 9904. Department Two. February 26, 1912.]

AURORA LAND COMPANY *et al.*, Respondents, v. DELLA
KEEVAN *et al.*, Appellants.¹

BILLS AND NOTES—CONSIDERATION—DEFENSES. False representations on the sale of a draying outfit by a bank to a partnership, are not a defense to a note for \$500, given by one of the partners and another person to the bank in connection with the sale, and discounted, and placed to the credit of the copartnership, and used in part payment of the outfit, since the consideration of the note was an actual loan of \$500.

EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACTS—NOTES. Parol evidence that a note made by one member of a partnership and another person was to be paid by the partnership instead of the makers is inadmissible as varying the terms of the writing.

SALES—FRAUD—FALSE REPRESENTATIONS—OPINIONS. Where parties were dealing at arm's length, and the seller did nothing to deceive or mislead, representations as to the condition of horses, wagons, and equipment and the cost of putting the same in repair are mere expressions of opinion and not actionable, where the property was at hand and the buyers had every opportunity to make examination and inquiry.

SALES—FRAUD—RESCISSION BY BUYER—LACHES. A buyer cannot rescind a sale of wagons, teams, and equipment, on account of false representations as to their condition, where nothing was done calculated to deceive, the same were at hand and could have been examined, the condition was fully ascertained a day or two after the sale, and no steps taken to rescind for five months.

JUDGMENT—CONCLUSIVENESS—BAR—MATTERS CONCLUDED. A judgment in an action for an accounting, brought by the receiver of a copartnership against a bank, is conclusive on any issue as to whether the bank had in its possession funds belonging to the partnership.

Appeal from a judgment of the superior court for King county, Prigmore, J., entered April 25, 1911, in favor of the plaintiffs, upon the verdict of a jury by direction of the court, in an action on a promissory note. Affirmed.

J. E. McGrew, for appellants.

F. J. Carver and *John Slattery*, for respondents.

¹Reported in 121 Pac. 469.

ELLIS, J.—This action was brought on February 14, 1910, by the Aurora Land Company, on a promissory note dated February 3, 1909, for \$500, executed by the defendants, appellants here, to the respondent, Northern Bank & Trust Company, the note having been assigned to the land company for the purpose of collection only. On motion of the defendants, who claimed that the note was procured through fraud, the bank was made a party plaintiff. The defendants answered, setting up as matters of defense, that there was no consideration for the note; that the note was to be paid by a copartnership, of which the defendant Healy was a member; that the note was made in connection with a conditional sale contract to the copartnership, which contract was induced by fraud and false representations on the part of the bank; that the bank having rescinded and cancelled the sale contract and resumed possession of the property, was estopped from collecting the note. These allegations were put in issue by the reply. The only testimony actually taken in defense was that of the defendant Healy. The trial court being of opinion that this testimony conclusively showed that there was no valid defense to the note, it was agreed that counsel for defendants state fully what he expected to prove in addition thereto, in order that the court might determine whether there would be any utility in receiving the evidence. This was accordingly done; and the court being still of opinion that, if the defendants proved all that they offered, so far as admissible, their evidence would still be insufficient to constitute a defense, directed a verdict for the plaintiffs, and entered judgment thereon, from which judgment the defendants have appealed.

The testimony of the appellant Healy was to the effect that he was one of a copartnership, consisting of himself and two others, doing business as Alaska Transfer Company; that, at about the time of the making of the note here in question, the bank sold to the copartnership, for an agreed consideration of \$7,300, a certain draying outfit, under a conditional sale

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contract, which is in evidence. This contract provided that \$250 be paid in cash upon its delivery, and the remainder in installments, and that the copartnership should, on delivery of the contract, place on deposit in the bank the sum of \$750, to secure performance of certain stipulations in the contract. He further testified that he deposited \$500 in the bank to the credit of the copartnership, and that he and the defendant Keegan executed the note for \$500 here in question to the bank, which thereupon placed also to the credit of the copartnership the sum of \$500, proceeds of the note, making the deposit of the copartnership \$1,000; that out of these deposits there was paid to the bank the \$250, first payment upon the sale, leaving \$750 on deposit as required by the contract; that his two partners were familiar with the draying outfit, but that he was not, and that the president of the bank and its agent, one Dickson, represented to him that the horses, wagons and equipment were in good condition, and the outfit could be placed in good repair for about \$400; that he refrained from making an examination because the president of the bank, on February 3, 1909, when the sale was closed, told him that the sale must be closed at once, as another trade was pending; that he made no inquiry from his partners as to the condition of the property, but acted upon the representations of the bank's president and agent; that the property was in the city of Seattle, near where he roomed, and he could have seen it at any time, especially in the evening when the horses were in the stable; that he went to the place the day after the sale was closed and remained there repairing the outfit from then almost continuously until about May 10, 1909; that the wagons, teams and harness were not as represented, but were in very bad condition and the lowest estimate he could get for repairs was about \$1,100. There was no evidence, or offer of evidence, that either he or his partners ever rescinded, or sought to rescind, the contract on account of the alleged misrepresentations, or for any other reason.

The offer of evidence was to the effect that \$700 was paid

upon the contract in cash; that between \$1,100 and \$2,000 in collectible bills was turned over to the bank and its agent for collection to apply on the contract; that the bank and its agent refused to pay claims contracted for by the partnership, and applied the money to their own use; that the note sued upon was given as a part of the consideration for the purchase of the transfer property, with the understanding that it would be paid out of the proceeds of the transfer business; that ample money to pay the note had been received by the bank, but was not so applied; that the copartners, while the property was in their possession, put it in good repair at a cost of \$600; that the bank wrongfully forfeited the contract and resumed possession of the property in order to resell it to other parties without accounting for the money received from the copartnership.

It was admitted that a receiver was appointed to close up the affairs of the partnership; that he brought an action against the bank for an accounting; that a trial was had in that action and that it was finally disposed of, but just what the final judgment in that action was does not appear.

These are the material matters brought out by the evidence and offers of evidence as a defense to the note. It is clear that they did not constitute a valid defense, and that the court did not err in refusing to submit the case to the jury.

The evidence makes it plain that the consideration of the note was an actual loan of \$500. That this money was deposited to the credit of the copartnership is immaterial, since there was no evidence or offer of evidence that this was not with the knowledge and in accordance with the intention of the makers of the note.

The evidence offered to the effect that the note was to be paid by the copartnership, rather than by the appellants, the makers of the note, was inadmissible. It tended to vary the terms of the note itself, the written undertaking of the makers to pay. It may be that, as between the parties, there was an agreement that the partnership would pay the note, but this

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could in no sense affect the right of the bank to look to the makers of the note to pay the money as therein stipulated.

The fact that the note was given in connection with the conditional sale is also immaterial, since the evidence relied upon as establishing fraud in that transaction was wholly insufficient for the purpose. It is obvious that the representations of the bank and its agent were merely expressions of opinion. The parties were dealing at arm's length. It is not claimed that the bank or its agent occupied any peculiar relation of trust to the defendant Healy. He had every opportunity to examine the property, and his partners were thoroughly familiar with it. Since he did not choose to look at it nor to make any inquiry of them as to its condition he cannot now complain. There was no evidence, nor offer of evidence, that either the bank or its agent did anything reasonably calculated to deceive him or to prevent his adopting either of these obvious and easy methods of acquiring full knowledge. Even if he had sought a rescission of the contract of purchase, he must have failed under the evidence here offered. *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955; *Jones v. Reynolds*, 45 Wash. 371, 88 Pac. 577; *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176.

Moreover, there was no attempt to rescind the contract. The condition of the property, whatever that condition was, became fully known to the appellant Healy a day or two after the sale. He and his partners retained the possession and use of the property till sometime in July, 1909. So far as the record shows, no offer to rescind was made and no ground for rescission suggested until this suit was brought. Even if the note had been confessedly received by the bank as part pay-

ment on the sale, as claimed by appellant, and not for a loan, it would now be too late to claim a failure of consideration on the ground of fraud.

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted." *Grymes v. Sanders*, 93 U. S. 55-62.

See, also, *Eldridge v. Young America etc. Min. Co.*, 27 Wash. 297, 67 Pac. 703; *Provident Loan & Trust Co. v. McIntosh*, [68 Kan. 452, 75 Pac. 498] 1 Am. & Eng. Ann. Cases, 906.

A consideration of the evidence and the offered evidence makes it equally clear that the bank was not precluded from collecting the amount due on the note by reason of the fact that it had declared the contract forfeited for nonpayment of installments due thereon, and had resumed possession of the property. The evidence of Healy himself places it beyond cavil that the note was given for an actual loan of money. The fact that the money was used in connection with the purchase of the property does not alter the status of the note as evidencing an independent debt of its makers. As such, it was due to the bank whether the sale was carried through to final payment or not.

The claim that an accounting would show that the bank had funds in its hands belonging to the copartnership sufficient to pay the note is also untenable. The admission that the receiver of the partnership had sued the bank for an accounting, and that the suit had proceeded to a final judgment, effectually disposes of this contention. Whatever the judgment in that action was, it was conclusive and merged all claims for an accounting. In the case before us, no judgment in favor of the copartnership or in favor of Healy was pleaded as a set-off against the note, nor was there any offer

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to prove any such judgment. The appellants here could assert no right to an accounting except through the copartnership. The suit by the receiver was, therefore, conclusive of that matter.

The judgment is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 10042. Department One. February 26, 1912.]

B. A. LEWIS, *Respondent*, v. UNITED COLLIERIES COMPANY,
Appellant.¹

MONEY LOANED—EVIDENCE—SUFFICIENCY. A judgment for money loaned is sustained by evidence that the plaintiff loaned the money, either to defendant or one W., and placed it in the hands of W. to pay defendant's obligations, and that it was so used, although there was conflict involving the credibility of witnesses as to whether the loan was made upon the credit of defendant or W.

Appeal from a judgment of the superior court for King county, Chapman, J., entered July 5, 1911, upon findings in favor of the plaintiff, in an action for money loaned. Affirmed.

Smith & Cole, for appellant.

Peters & Powell, for respondent.

PARKER, J.—This is an action to recover the sum of \$600, the amount of a loan alleged to have been made by the plaintiff to the defendant. Upon a trial before the court without a jury, findings and judgment were rendered in favor of the plaintiff, from which the defendant has appealed.

Nothing is presented here save the question of the sufficiency of the evidence to support the findings and judgment. There is no question but that, at the time of making the loan, it was made by respondent, either to appellant or to one Williams. The evidence shows almost conclusively that the

¹Reported in 121 Pac. 443.

money was loaned and placed in Williams' hands for the express purpose of paying obligations of appellant, and that it was immediately thereafter so used by Williams. There is conflict in the evidence as to Williams being the agent of appellant for the purpose of the loan, and also as to whether or not the loan was made upon the personal credit of Williams or upon the credit of appellant. This conflict involves the credibility of witnesses. A careful reading of all the evidence convinces us that we would not be warranted in disturbing the findings of the trial court, especially in view of the fact that the money was actually used for appellant's benefit. We deem it unnecessary to review the evidence here. The judgment is affirmed.

DUNBAR, C. J., CROW, and CHADWICK, JJ., concur.

[No. 10030. Department One. February 26, 1912.]

LENA FRASIER *et al.*, *Appellants*, v. COWLITZ COUNTY,
Respondent.¹

COUNTIES—CLAIMS—PRESENTATION—ON BEHALF OF MINORS. A presentation of a claim by a widow for herself and minor children for the death of her husband through the fall of a county bridge, is a sufficient presentation on behalf of the children, under Rem. & Bal. Code, § 3909, providing in general terms that an action may be brought against the county after a claim has been presented and disallowed, without specifying who shall present the claim; especially in view of Rem. & Bal. Code, § 5932, giving such parent control of the children and their estate.

COUNTIES — CLAIMS — VERIFICATION—FORM. Under Rem. & Bal. Code, § 8354, requiring claims against a county to be sworn to before an officer having a seal, and that the bureau of inspection and supervision of public offices shall prescribe the form of affidavits, a claim verified before a notary public using his seal cannot be objected to as not in the form prescribed by the bureau, where it is not made to appear that the bureau had prescribed any form when the affidavit was made.

¹Reported in 121 Pac. 459.

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Opinion Per GOSE, J.

Appeal from a judgment of the superior court for Cowlitz county, McKenney, J., entered June 9, 1911, upon granting a nonsuit, in an action for wrongful death caused by the collapse of a county bridge. Reversed.

W. G. Drowley, Robt. E. Tunstall, and C. Kalahan, for appellants.

R. W. Wilbur, Geo. W. Rowan, and J. E. Stone, for respondent.

GOSE, J.—This action is prosecuted by the widow and minor children of William R. Frasier, deceased, to recover damages arising from his death through the alleged negligence of the defendant. On October 9, 1909, the deceased was riding upon a loaded wagon over a bridge which formed a part of a county road, in Cowlitz county, when the bridge collapsed, causing the wagon and wheel team to fall to the bed of the stream, and inflicting injuries upon him from which he died three days later. On November 4 following, the widow, on behalf of herself and her minor children, presented a verified claim for damages to the board of county commissioners of Cowlitz county, wherein she claimed that the death of her husband was caused by the negligence of the county. On December 7 following, the board rejected the claim. This action was commenced in February, 1910. The complaint alleges, and the evidence tends to show, that the bridge had been unsafe for a considerable time before the injury, and that the defendant knew it. At the close of the plaintiff's evidence, the court, upon the challenge of the defendant, entered a judgment in its favor. The judgment shows upon its face that it was entered for the defendant because it was the opinion of the court that no claim had been presented to the county by any person "lawfully authorized to present the same" for the minor appellants.

The appeal presents two questions; (1) Was the presentation of the claim by the widow for herself and minor children a legal presentation on behalf of the children, and (2)

was the claim properly verified? The statute provides that an action may be brought for the enforcement of a claim against a county after it has been presented and disallowed by the board of county commissioners. Rem. & Bal. Code, § 3909. This statute is construed, in *Hoexter v. Judson*, 21 Wash. 646, 59 Pac. 498, to mean that an action cannot be prosecuted against a county upon a claim, whether resting in contract or arising from a tort, until a claim has been presented to the county commissioners for allowance or rejection. The statute makes no provision as to who shall present the claim, or as to what the claim shall set forth. We think the first question must receive an affirmative answer. In *McLeod v. Spokane*, 26 Wash. 346, 67 Pac. 74, it was held that the wife might verify a claim against the city for damages which she sustained in consequence of its negligence. That action was prosecuted by the husband and wife, and the contention that the claim was not presented in behalf of both of the parties was rejected. Statutory and charter provisions, requiring the presentation of claims and notice of injuries to the governing authority of the municipality sought to be charged with liability before a suit can be maintained thereon, are to be liberally construed. *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383; *Ehrhardt v. Seattle*, 33 Wash. 664, 74 Pac. 827; *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31; *Schnee v. Dubuque*, 122 Iowa 459, 98 N. W. 298.

The purpose of these provisions, as applied to a claim arising from a tort, is to enable the municipality to investigate both the claim and the claimant while the occurrence is recent and the evidence available, to the end that it may protect itself against spurious and unjust claims. When the claim substantially complies with the legislative requirement and these ends are subserved, the claim has accomplished the purpose intended. In an action prosecuted by an administrator for the benefit of the widow and children to recover damages arising from the death of the intestate caused by

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the alleged negligence of the defendant, a notice of the injury signed by the attorney for the administrator was held sufficient. *Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809. See, also, *Carpenter v. Town of Rolling*, 107 Wis. 559, 83 N. W. 953. Under a statute requiring a notice of the claim to be given "by the person injured or by any other person in his behalf," it was held that the father, the natural guardian of his minor children, might give the notice. *Taylor v. Woburn*, 130 Mass. 494. The same general principle is announced in *Perry v. Clarke County*, 120 Iowa 96, 94 N. W. 454.

"There is no doubt but what a person other than the injured employee may give the notice required by the act, provided that he gives it upon the plaintiff's behalf." Dresser, *Employers' Liability*, § 31, p. 174.

"A statute requiring such a notice in general terms, without any exception, applies to infants as well as to adults; and hence such a notice or statement may be made by an infant where the infant is the injured person." 5 Thompson, *Negligence*, § 6349.

The argument that the commissioners could not safely pay the portion of the claim belonging to the minors to any one except a guardian, and therefore that none but a guardian may present the claim on their behalf, is more plausible than substantial. As we have seen, the minor may present a claim in his own behalf, and the party against whom the claim was asserted would be confronted with the same condition suggested by the argument. In either case, the party against whom the claim was asserted could protect himself by requiring the appearance of a guardian before paying over the money. We think the statutory requirement is met when a joint or joint and several claim is presented by any one of the beneficiaries. It is probably true in this state, as counsel asserts, that the guardianship by nature extends only to the custody of the person of the ward and not to his property. But this does not preclude the parent, in a case like this,

from making a preliminary claim or demand in behalf of the minor. Rem. & Bal. Code, § 5932.

The second contention that the claim was not properly verified is based upon Laws of 1909, p. 142, § 9; Rem. & Bal. Code, § 8354. This section provides that claims like the one at bar shall be sworn to before an officer having a seal and authorized to take acknowledgments. It further provides that, "the bureau of inspection and supervision of public offices shall prescribe the form of affidavits, and no warrant shall be drawn for any claim not properly sworn to." The claim was verified by the widow like an ordinary pleading, before a notary public who impressed his seal upon the jurat. The precise point pressed is that there is no evidence that the verification is according to the form prescribed by the bureau of inspection. This contention is without merit. There is no evidence that the bureau had prescribed any form of affidavit when the claim was presented. It will be observed from reading the language just quoted that there is no provision for bringing to the public notice the form of affidavit prescribed by the bureau. The statute does not provide for its publication, nor does it provide for the entry of an order establishing the form in any public office in the state. The appellant clearly made a *prima facie* case. She complied with all the terms upon the face of the statute. *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663.

We think the learned trial court was in error in withdrawing the case from the jury. The judgment is therefore reversed, with directions to proceed with the trial.

DUNBAR, C. J., PARKER, CROW, and CHADWICK, JJ., concur.

[No. 9922. Department Two. February 26, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Nicomen Boom Company, Respondent*, v. NORTH SHORE BOOM & DRIVING COMPANY *et al.*, *Appellants*.¹

CONTEMPT—CIVIL CONTEMPT—DAMAGES—RIGHT TO JURY TRIAL. The right to trial by jury does not extend to proceedings for contempt for the wilful violation of a judgment, although damages for civil contempt are claimed and may be awarded on summary trial by the court, under Rem. & Bal. Code, §§ 1053, 1056.

CONTEMPT—CIVIL CONTEMPT—AFFIDAVIT—SUFFICIENCY. An affidavit for civil contempt for the violation of a judgment is sufficient where it sets out a wilful violation of the order and the damages caused thereby.

CONTEMPT—CIVIL CONTEMPT—MEASURE OF DAMAGES. The measure of damages for civil contempt in operating a boom in violation of a judgment, whereby certain logs were prevented from entering relator's boom, is the price relator would have earned in booming the logs, less the reasonable cost of boomage; the profit being neither remote nor speculative.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Pacific county, Geo. Dysart, Esq., judge *pro tempore*, entered February 18, 1911, upon findings in favor of the plaintiff, awarding damages for a civil contempt, after a trial before the court without a jury. Affirmed.

W. H. Abel and *Edward H. Wright*, for appellants.

W. W. Cotton, Welsh & Welsh, and *James G. Wilson*, for respondent.

MOUNT, J.—This is a contempt proceeding, instituted by the relator against the defendants, charging them with wilfully violating an order and decree of the superior court in the case of *Nicomen Boom Company v. North Shore Boom & Driving Company*. The relator sought to have defendants fined and imprisoned, and also to recover damages sustained

¹Reported in 121 Pac. 467.

since November 22, 1907, up to April 24, 1910. This proceeding grows out of the same case as the one reported in 55 Wash. 1, 103 Pac. 426, viz., *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.* The parties and the judgment are the same, the violation of the judgment and the relief sought are of the same character, and the defenses made are the same. In short, this proceeding is based upon a continued violation of the judgment rendered in that case. A history of the litigation is there stated and need not be repeated here. The trial court in this proceeding followed the proceeding adopted in that case, and rendered a judgment requiring the defendants to pay to the relator the profit which the relator would have made in the operation of its boom since November 22, 1907. Before beginning the trial, the defendants demanded a jury, which the court denied.

It is now argued that, because the relator prays for damages and the trial court found that the defendants were not guilty of a wilful contempt, there remains but one issue, viz., the right of the relator to recover damages and the amount thereof, and that such issue should have been determined by a jury. It must be remembered, however, that this is a proceeding in contempt where the defendants are accused of wilfully violating a judgment of the court. If the relator is entitled to recover damages at all, it is by reason of the fact that defendants are guilty of a contempt of court. The penalty is imposed upon conviction, and may consist of imprisonment or fine, or both, and in addition, where injury has occurred to a party in an action, the court "may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him." Rem. & Bal. Code, § 1053. The statute does not provide for a jury trial in such case, either to determine the guilt or innocence of the accused or to determine the penalty. The trial is summary by the court without a jury. Rem. & Bal. Code, § 1056. In the other case, quoting from *Lorick v. Motley*, 69 S. C. 567, 48 S. E. 614, we said:

"When the contempt does not directly affect any particular individual, the penalty is inflicted for the benefit of the state at large. When, on the other hand, property of an individual is taken or destroyed in contempt of the court's order, those interested have a right to ask of the court its restoration or payment of its value at the hands of the offender, and the court requires such restoration or payment of its value as part of the punishment. In each instance the ultimate purpose is the protection of adjudicated right."

In this case, the court found that the defendants had violated the judgment and had thereby damaged the relator. The court, therefore, was authorized as a part of the penalty to give judgment for a sum of money sufficient to indemnify the relator. In *People ex rel. Attorney General v. Tool*, 35 Colo. 225, 86 Pac. 224, 229, 231, 117 Am. St. 198, 6 L. R. A. (N. S.) 822, the court said:

"The right of trial by jury does not extend to charges for contempt. A court having jurisdiction to issue an injunction has the inherent power to punish for contempt those who violate its mandates. . . . This question of the right of trial by jury has frequently received the attention of the courts in cases where authority was specially conferred upon, or exercised by, a court of equity to enjoin the continuance of a nuisance, with the result that practically the unbroken trend of authority is to the effect that laws authorizing such actions to be maintained do not invade constitutional rights."

Judge Cooley, in his work on Constitutional Limitations (6th ed.), p. 389, note 2, says:

"Cases of contempt of court were never triable by jury, and the object of the power would be defeated in many cases if they were."

See, also, *State ex rel. Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. 624. It follows that no error was committed in the denial of the demand for a jury trial.

Appellants argue further that the affidavit is insufficient. It is only necessary to say upon this point that the affidavit clearly sets out a wilful violation of the order of the court by the defendants, and also the damages caused thereby to

the relator. A large part of appellants' lengthy brief is taken up in a discussion of the point that the court erred in the measure of damages. The court found that defendants had boomed 32,796,166 feet of logs, board measure, which would have been cared for in relator's boom had not the judgment of the court been violated; that the price of such boomage was sixty cents per thousand feet; that the reasonable cost of boomage was twenty cents per thousand, and that the net profit was forty cents per thousand. The evidence is ample to support each of these findings. This measure of damages was sustained in the other case. 55 Wash. page 11. It was the correct measure, under the rule in *West v. Martin*, 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. (N. S.) 324, where we said:

"Where the natural and direct result of a tort is the interruption of or an injury to an established business, there may be a recovery of profits lost during the period of enforced suspension or by reason of the tortious act."

In this case, these profits were neither remote nor speculative, for the logs actually came down to the boom in the amount stated, and were caught and rafted by the defendants, who were operating a boom in violation of the order of the court; and but for these wrongful acts of the defendants, the relator would have handled these logs and would have made the profit stated. There is no error in the record. The judgment is affirmed.

DUNBAR, C. J., MORRIS, and ELLIS, JJ., concur.

FULLERTON, J., dissents.

[No. 10090. Department One. February 26, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Stewart &
Holmes Drug Company, Plaintiff*, v. THE SUPERIOR
COURT FOR KING COUNTY, *Respondent*.¹

VENUE—CHANGE—GARNISHMENT—RESIDENCE OF GARNISHEE. Upon default by a nonresident defendant in the main action, a garnishee defendant is entitled to a change of venue to the county of his residence for a trial of the issue in the garnishment.

VENUE—CHANGE—APPLICATION—AFFIDAVIT OF MERITS—RESIDENCE OF GARNISHEE. Under Rem. & Bal. Code, § 208, providing that where an action is not brought in the proper county, a trial may be had there unless the defendant files an affidavit of merits and demands a change of venue, an affidavit of merits, in the technical sense, is not necessary upon a demand for a change of venue by a garnishee defendant to the county of his residence, when construed with reference to §§ 207 or 209, authorizing a change of venue when it appears by affidavit that the county designated in the complaint is not the proper county, or when necessary to secure a fair trial, or for the convenience of witnesses.

Application for a writ of certiorari to review an order of the superior court for King county, Myers, J., entered December 21, 1911, granting a change of venue to the county of the residence of a garnishee. Denied.

Leopold M. Stern (*J. W. Russell*, of counsel), for relator.
Edward Judd, for respondent.

CHADWICK, J.—This is an original application for a writ of certiorari. Relator, the Stewart & Holmes Drug Company, began an action in the superior court of King county, against one J. G. Ross, and at the same time began a garnishment proceeding against J. W. Reed, who lives in San Juan county. The sheriff of King county returned the summons and complaint in the principal action "not found," and an order was thereupon made directing the publication of

¹Reported in 121 Pac. 460.

summons. The garnishee defendant appeared within the time limited by law, and made answer, accompanied by a motion for a change of place of trial to San Juan county. This motion was based upon an affidavit showing that he was a resident of San Juan county. Upon hearing, the respondent herein made an order directing that the motion for a change of venue be granted, conditioned, however, upon the nonappearance of the defendant Ross within the time limited by law. Respondent further directed that, "the clerk of this court hold the papers in King county until the expiration of the time for appearance of the defendant Ross. If the defendant Ross appears and defends the action, the motion for a change of venue is denied. If the defendant Ross does not appear and is defaulted, then the motion for a change of venue is granted, and the clerk of the court is authorized to send all the papers to the clerk of the superior court of San Juan county for trial." The time for appearance having expired, default was taken against the principal defendant, and relator came to this court asking for a review of the proceeding, in so far as the order changing the venue is concerned.

The relator contends that the venue of the principal action was properly laid in King county; that garnishee process is properly issued in an action where service of summons is had by publication; that the garnishment gives the court jurisdiction over the nonresident defendant; that the garnishment is auxiliary and ancillary to the main issue, and is triable where the main action is triable, all of which may be admitted; but being so, we are of opinion that the case against the garnishee may be sent for trial to the county in which he resides. The case of *State ex rel. Wyman v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 111 Am. St. 915, 2 L. R. A. (N. S.) 568, is valuable in that it not only illustrates the rule governing the practice in garnishment cases, but also clearly indicates the right of nonresident garnishee defendants to have a case, in so far as they are concerned,

removed under the general statutes providing for a change of venue. The court said:

"Statutes conferring the right to a change of venue are enacted with a view of affording litigants a fair and impartial trial. They are in furtherance of justice, and should be liberally construed so as not to defeat the right. . . . In *Kelly v. Ryan*, 8 Wash. 536, 36 Pac. 478, . . . the court held that the garnishment proceeding was simply a step in the main action, was ancillary thereto, . . . The county in which the main action is pending is the *proper* county in which to sue out a writ of garnishment, regardless of the place of business of a corporation or the residence of the garnishee, and to that extent the garnishment statute supersedes other statutes requiring certain actions to be brought in a particular county."

By citation of apt authority, the court shows the rule to be that, "there is no objection to a severance." After quoting § 327, Rood on Garnishment:

"The decisions holding that the garnishment follows the main case on change of venue, are no authority to the effect that the garnishee cannot have a change of venue, for no judgment can be rendered against him until the main action is in judgment, after which the reasons for keeping the two together are less;"

the court continues:

"A garnishment proceeding is neither more nor less than an action by the defendant against the garnishee for the use of the plaintiff. It possesses all the elements of any other action. The law contemplates that contingencies will arise where the ends of justice demand a change in the place of trial. A garnishment proceeding comes within the spirit of this law, and is not excluded by the letter."

It is further insisted that, if we come to this conclusion, the order cannot be sustained because the application is insufficient, in that it is not accompanied by an affidavit of merits. Section 208, Rem. & Bal. Code, is relied on:

"If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time

he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county."

This section must be construed with reference to §§ 207 and 209. When so considered, we think it is clear that, although admitting that there are certain cases where an affidavit of merits, taken in its old-time technical sense, is an essential prerequisite to the order of the court, it does not follow that it is so in all cases. Section 209 provides that the court may change the place of trial when it appears by affidavit that "the county designated in the complaint is not the proper county," or "to secure an impartial trial," or for the "convenience of witnesses, or to serve the ends of justice." Clearly the affidavit mentioned here is not the old-time affidavit of merits. The merit of the case is immaterial where a defendant may change the place of trial to the county of his residence as a matter of right; or the court, as a matter of discretion, may order a change when a showing is made that an impartial trial cannot be had, or when the convenience of witnesses or the ends of justice demand that it be so. A change of venue is made, under these circumstances, when facts showing any of these conditions are made to appear, not because there may be a defense to the action which is sustained by advice of counsel, but because of the statute itself; and when a showing of any of these grounds is brought to the attention of the court by affidavit, it will be held to be an "affidavit of merits," within the meaning of the term as employed in § 208, and the word "affidavit" as it appears in § 209, Rem. & Bal. Code. So in this case, the residence of the defendant being in San Juan county, and it having transpired that the principal action will not be tried upon its merits in King county, we find no reason for interfering with the order of the court, whether it be grounded upon the absolute right of a defendant (4 Ency. Plead. & Prac., p. 393), or upon the discretionary power of the court.

Writ denied.

DUNBAR, C. J., CROW, and PARKER, JJ., concur.

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[No. 10053. Department Two. February 28, 1912.]

HARRISON B. MARTIN, *Appellant*, v. CHARLES RANKERT,
Respondent.¹

TAXATION—DOUBLE TAX—MISTAKE—TAX TITLE—VALIDITY. Where land had been assessed for several years under the latest plat, superseding an earlier plat, a duplicate tax resulting from a mistake in again placing the property on the tax rolls under the earlier plat and descriptions, is void, and purchasers at a tax sale thereunder acquire no title.

TAXATION—LIEN—JUDGMENT—COLLATERAL ATTACK. A tax judgment may be collaterally attacked in a suit to quiet title where the tax has been paid, or the real estate is not subject to taxation, under the express exceptions of Rem. & Bal. Code, § 9267.

Appeal from a judgment of the superior court for Franklin county, Carey, J., entered December 30, 1910, upon findings in favor of the defendant, in an action to quiet title. Affirmed.

Harrison B. Martin, for appellant.

H. B. Noland, for respondent.

MOUNT, J.—Action to quiet title to certain real estate, in the town of Pasco. The trial court found in favor of the defendant, and entered a decree accordingly. The plaintiff has appealed.

The facts are substantially all record facts, and are not disputed. It appears that, in the year 1889, one Pettit and wife platted into lots and blocks a tract of land which they then owned. They filed this plat, which designated the land as "Pettit's Addition to the Town of Pasco." One of the blocks upon this plat was not subdivided into lots. This block was designated on the plat as block B. It was a triangular tract, and contained 2.87 acres of land. On March 1, 1890, one M. J. Fox, being then the owner of block B, subdivided this block into thirty-two lots, numbered from 1 to

¹Reported in 121 Pac. 817.

32, inclusive. The block was then platted, and the plat was approved and filed in the county auditor's office. This plat designated the block, "Keystone Addition to Pasco." These lots were afterwards sold and conveyed to various persons, under descriptions in Keystone addition. After this last-named plat was filed, this block, which had theretofore been assessed for purposes of taxation, as "Block B, Pettit's Addition," was dropped from the tax rolls for the years 1890-91-92-93, and the property was thereafter continuously assessed to the various owners as lots in Keystone addition. The taxes on lots 1 to 15 inclusive have been paid by the owners ever since. The taxes on lots 16 to 31 were permitted to become delinquent. In the year 1894, the whole block was, by mistake, again placed upon the tax rolls as "Block B, Pettit's Addition to Pasco," and was assessed to owners "unknown." Taxes were charged against the whole block, aggregating \$4.62 for the years 1894-5-6. Taxes were for the same years also levied upon the same land as lots in Keystone addition, and the taxes were paid regularly by about one-half of the owners. The other lots were permitted to go delinquent, as stated above. The taxes assessed against the whole block as one parcel, under the description of "Block B of Pettit's Addition," also became delinquent. Certificates of delinquency were issued to Franklin county; and afterwards, in the year 1902, the county, by a general tax foreclosure, proceeded to sell the same land under the two different descriptions. The plaintiff acquired title to the whole block under the foreclosure proceedings against block B of Pettit's addition, while the defendant subsequently acquired title to lots 16 to 31, inclusive, of Keystone addition, being about half of what was formerly block B of Pettit's addition.

It is argued by the appellant that he is entitled to prevail in this action, because his title from the county is prior in time to that of defendant; and that, when the county issued the deed to him, it thereby divested itself of all title and

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could not thereafter vest title in another. It is apparent, however, that the title depends upon the validity of the tax upon which the foreclosure was based. It is not disputed that a double tax was levied upon the same land, and it is not disputed that error occurred by the taxing officers in placing the description "Block B, Pettit's Addition," upon the tax rolls, when the land was already upon the same rolls where it had been carried for several years under another description, according to the later replat, which had superseded the former description. A notation, to the effect that block B, Pettit's addition, was erroneously sold and assessed, was made upon the tax rolls by the county treasurer, as is required by § 9264, Rem. & Bal. Code, as soon as the error was discovered, which was prior to the time this action was brought. There can be no doubt that one of these taxes was and is void. It seems clear upon the record that the tax levied under the description "Block B, Pettit's Addition," must be so held, because the land had been assessed for several years under the description designated in the later plat, and also because the former description, block B of Pettit's addition, had been discontinued and was by mistake inserted upon the tax rolls. The whole block was at that time owned by several different persons. Taxes had been paid upon fully one-half of the block by such owners, who, so far as this record shows, knew nothing of the other assessment. Where the tax has been paid, or where the real estate is not subject to taxation or assessment, a tax judgment may be attacked collaterally. Rem. & Bal. Code, § 9267; *Loving v. McPhail*, 48 Wash. 113, 92 Pac. 944; *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675.

We are satisfied that the tax levied upon the block after its subdivision into lots, under an approved plat which designated the tract as Keystone addition, was a valid levy, and that the other levy, having been made by mistake, was void. The trial court therefore was right in concluding that the

plaintiff had no title to any part of the land. The judgment is therefore affirmed.

DUNBAR, C. J., FULLERTON, MORRIS, and ELLIS, JJ., concur.

[No. 9978. Department Two. February 28, 1912.]

GUSTAV ULRICH, *Appellant*, v. PATEROS WATER DITCH COMPANY *et al.*, *Respondents*.¹

WATERS—IRRIGATION—WATER CONTRACT — CONSTRUCTION — AGREEMENT RUNNING WITH LAND. An agreement for water for irrigation, calling for a certain number of miners' inches for specific tracts of land, which was binding on each parcel of land separate and apart from the others, the conditions to be binding upon heirs and assigns, runs with the land, and places a purchaser of a tract in the situation of the original contractee.

CORPORATIONS — REPRESENTATION — CONTRACTS — STOCKHOLDERS—RATIFICATION BY CORPORATION. Where, in consideration of 98 per cent of the stock of an irrigation company, the purchaser entered into an agreement to furnish water for specified tracts of land, and agreed to execute a water deed therefor as soon as he was made president of the corporation, the company ratifies the contract by furnishing water and receiving payments therefor under the contract.

WATERS — IRRIGATION—CONTRACTS—"MINERS INCHES"—PAROL EVIDENCE—CERTAINTY—SPECIFIC PERFORMANCE. A contract for a certain number of "miners' inches" of water to be taken from an irrigation ditch is ambiguous, and may be shown by parol evidence to mean in that locality a quantity of water which would flow through an orifice one-inch square under at least a four-inch pressure; and when so explained, is sufficiently definite to admit of specific performance.

WATERS—IRRIGATION—WATER CONTRACTS — BREACH — MEASURE OF DAMAGES. Upon specific performance of a contract to furnish plaintiff five miners' inches of water, to be taken from a ditch at a point most convenient for the irrigation of plaintiff's land, the measure of plaintiff's damages should be interest on his investment at the legal rate from the date of the refusal to furnish water, less the maintenance fee, rather than the remote and speculative profits that he might have made from the cultivation of the land, where it

¹Reported in 121 Pac. 818.

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appears that his land was some distance from the ditch, the lands were never cultivated and the plaintiff had not constructed his diverting ditches or acquired the right to do so.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered March 27, 1911, upon findings in favor of the defendants, dismissing an action for specific performance. Reversed.

Peter McPherson, for appellant.

Smith & Gresham, for respondents.

MOUNT, J.—Action for specific performance of a contract. Upon a trial of the case, the court denied the plaintiff any relief, and dismissed the action. Plaintiff has appealed.

It appears that, prior to October, 1905, one C. J. Steiner had constructed a ditch or canal, about six miles in length, along the Methow and Columbia rivers, which ditch extended eastward up and along the low lands of the Columbia to a point about one-fourth of a mile from lots 1 and 2, section 29, township 30, north, range 24 east, in Okanogan county. This land at that time was government land, but had been filed upon by Mr. Steiner. Water was taken out of the Methow river, and was conveyed in the ditch to the lands lying along the canal, for purposes of irrigation. After the completion of this ditch, Mr. Steiner organized a corporation known as the Pateros Water Ditch Company, to which he conveyed the ditch, with all his rights and obligations. At that time, Mr. Steiner held ninety-eight shares of the stock of the corporation, being all of the stock except two shares. Thereafter, on October 28, 1905, Mr. Steiner sold and transferred all his shares of stock in the corporation to Mr. W. A. Sexsmith and Nellie E. Sexsmith, in consideration of an agreement entered into, as follows:

“For and in consideration for a transfer of 98 shares in the Pateros Water Ditch Company, of Pateros, Okanogan county, Washington, by C. J. Steiner, party of the first part, to Wm. A. Sexsmith and Nellie E. Sexsmith, his wife, par-

ties of the second part, Wm. A. Sexsmith and Nellie E. Sexsmith, his wife, agree to furnish 57 miners' inches of water for domestic and irrigation purposes during the irrigation season of each year, which shall begin with the 1st day of May, 1906, and continue until the 1st day of October, 1906, and each year thereafter. May 1st to October 1st of each year shall constitute the irrigation season. This water to be furnished from the Pateros water ditch through laterals or measuring boxes put in by the Pateros Water Ditch Company, at such a point as is most convenient to take the water from the ditch to put it on the hereafter described land, this water to be furnished on the following described lands, to wit: 7 miners' inches to be furnished for and on the lots 1 and 2, sec. 34, and lot 4, sec. 27, township 30, R. 23 E., W. M.; 35 miners' inches for and on the south one-half northwest one-quarter, northwest one-quarter of the southwest one quarter and lot 5. All in section 36, township 30, R. 23, E. W. M. 10 miners' inches for and on lots 4 and 5 to be used on what is now known as the East Steiner tract. All in sec. 31, township 30, R. 24, E. W. M. 5 miners' inches for and on lots 1 and 2, sec. 29, township 30, R. 24, E. W. M. All of these tracts being under the Pateros water ditch and in Okanogan county, state of Washington. Said Wm. A. Sexsmith further agrees to exercise all due diligence in keeping ditch bank in good repair, and sufficiently high to prevent any danger of breaks in said ditch to the damage of the above described lands. But if after all due diligence has been exercised said ditch bank shall break either by forceable entry or leaks in banks, or any other unavoidable cause, said C. J. Steiner waives all claims for damage from said Pateros Water Ditch Company. Said Wm. A. Sexsmith also reserves the right to cut off the water for general or special repairs but agrees to restore it as speedily as possible. C. J. Steiner, party of the first part, agrees to pay said Pateros Water Ditch Company, at Pateros, Washington, a maintenance fee of \$1.50 per miners' inch of water each year, being the sum of \$85.50 per year. This maintenance fee to become due and payable at Pateros, Washington, on the first Monday in May of each year, beginning with May, 1906, and each year thereafter. If said maintenance fee is not paid as above described, then and in that case the Pateros Water Ditch Company shall have the right to cut off the

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water supply until such a time as when the maintenance is paid. If the said maintenance fee is not paid before six months after the first Monday in May of each year the Pateros Water Ditch Company shall have the right to cancel the water on such a tract as said maintenance fee has not been paid in the above specified time. The above conditions however shall not be binding as a whole but on each parcel of land separate and apart from the other, and only such a tract as fails to meet the above conditions are subject to these conditions. Said W. A. Sexsmith further agrees to give a regular water deed to furnish water for the above described land as soon as he is elected president of the Pateros Water Ditch Company, and under the same conditions as herein provided. This deed is to be the regular water deed same as is furnished others along the ditch. Deed, however, to embody the conditions of this contract. Wm. A. Sexsmith further agrees to allow to be put into the Pateros water ditch wheels or any device whereby water may be lifted and put on lands above said ditch, not to interfere with the building or repair of said ditch. Said Wm. A. Sexsmith agrees to allow this water to be taken from said ditch for as much land as may be watered in this way for the regular maintenance fee of \$1.50 per acre for the water for as much land on the aforesaid described lands now owned by C. J. Steiner for such irrigation season; these conditions to be binding on heirs and assignees."

The contract was duly signed, and filed for record in the office of the county auditor. Thereafter Mr. Steiner paid to the Pateros Water Ditch Company the maintenance fee of \$1.50 per miners' inch for the years 1906-7, upon all of the lands described in the contract. In the year 1907, Mr. Steiner relinquished his filing upon lots 1 and 2 of section 29, township 3, range 24 E., W. M., to the plaintiff, and deeded to him the water right to five inches of water to be used upon that tract of land. Thereafter, for the years 1908-9, the plaintiff tendered the maintenance fee of \$7.50 for each year to Mr. Sexsmith, who was then manager of the water company, and demanded that the water be furnished for the five acres of land capable of irrigation. Both the tender and the

demand were refused. Thereafter this action was begun for specific enforcement of the contract and for damages.

The trial court was apparently of the opinion that the contract was one made by a stockholder of the corporation, and for that reason could not be specifically enforced against the corporation; and also that, even if the contract had been ratified by the corporation, it could not be specifically enforced because the amount of water was described in "miners' inches," which was too indefinite and uncertain to justify specific performance; and also, since specific performance could not be enforced, the plaintiff must seek his damages in an action at law. It is apparent that the plaintiff in this action occupies the same relation to the contract, in so far as it applies to the land purchased by him from Mr. Steiner, as Mr. Steiner himself would occupy had he not sold the land and water right to plaintiff, because the contract provides that the conditions thereof shall be binding "on each parcel of land separate and apart from the other," and that "these conditions shall be binding upon heirs and assignees," which indicates clearly that the conditions run with the land and are not personal to Mr. Steiner.

It is also apparent that the contract was made by Mr. Sexsmith and wife as stockholders. But it is clear that Mr. Sexsmith and wife obtained the stock for the purpose of managing the affairs of the corporation, for it is agreed that Mr. Sexsmith shall execute a deed as soon as he is elected president, and the whole context of the contract shows that he was purchasing substantially all of the stock of the corporation with the intention of carrying on the business of the corporation. The contract was entered into for the benefit of the corporation as well as for the benefit of the owners of the land. The contract was in line with the purposes for which the corporation was organized. While it is, no doubt, true that a stockholder as such may not enter into a contract which will bind the corporation of which he is a stockholder, nevertheless, if the corporation adopts and ratifies the con-

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tract by accepting the benefits thereof, it will be bound by the obligations of such contract. 3 Cook, Corporations (6th ed.), § 707; *Chilcott v. Washington State Colonization Co.*, 45 Wash. 148, 88 Pac. 113.

The trial court was of the opinion that the corporation did ratify the contract, and there is little room for doubt upon that question, because it was shown that, after Mr. Sexsmith became the managing officer thereof and knew of the contract, payments were made to and received by the corporation for furnishing water upon all the land described in the contract, including the land in question. We are satisfied, therefore, that the contract became a contract of the corporation by ratification, and that the corporation was bound by its terms.

The trial court was of the opinion that the term "miners' inch," as used in the contract, was indefinite and meaningless where no method of measurement was provided for therein, and for that reason denied specific performance. In *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308, this court said:

"The term 'miners' inch' cannot be definite, without the specification of the head or pressure, and the witnesses continually vary when speaking of the pressure in the 'miners' inch.'"

But it was also said in that case:

"The fact that he [plaintiff] did not describe a definite measurement of what he used, and that there was no clear and satisfactory proof showing the amount required, does not deprive him of his rights."

The contract in this case does not define the pressure. The term "miners' inch," as used therein, is no doubt ambiguous. In such cases, the rule is that oral evidence may be received to explain what the parties meant by the use of such terms. Such evidence was introduced in this case, and is clear to the effect that, at the time the contract was made and in that locality, it was commonly understood that the

term "miners' inch," as applied to the measurement of water, meant a quantity of water which will flow through an orifice one inch square under a four-inch pressure; that a four-inch pressure means that the head of water stands four inches above the top of the orifice. There was no dispute whatever upon this definition. Some of the witnesses stated:

"A miners' inch of water . . . is a body of water . . . taken . . . through an opening an inch square under a four-inch pressure or six in that particular locality. Some understand six and some four."

But no witness put the pressure less than four inches. It is perfectly apparent, therefore, that the parties to this contract intended the term "miners' inch" to mean the quantity of water which would flow through an orifice one inch square under at least a four-inch pressure. The evidence leaves no doubt upon that question. The contract in that respect is therefore not uncertain, and we are satisfied that it should be specifically enforced.

Appellant contends that he is entitled to substantial damages. Much testimony was offered to the effect that the plaintiff intended to plant the land to orchard, and that such orchard would now be very valuable. He also offered evidence to the effect that the amount of his profits would have been large if he had planted the land to alfalfa or other crops, and he contends that the measure of his damages is the value of the crops which he might have produced with water if the defendants had furnished it as they had agreed to do. We regard these items of damages as entirely too speculative and remote. In the first place, the lands were not planted to orchard or to crops of any kind, except perhaps a small garden for plaintiff's personal use. Again, it is by no means certain that the plaintiff would have utilized the water upon his land. It appears that the terminus of the ditch is about one quarter of a mile from the nearest point to plaintiff's land, and fully one-half mile from the land which he desires to irrigate. The contract provides:

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"This water to be furnished from the Pateros water ditch through laterals or measuring boxes put in by the Pateros Water Ditch Company at such point as is most convenient to take water from the ditch to put it on the hereinafter described land."

In view of the fact that this ditch was a completed structure at the time the contract was entered into, and in view of the fact that the Pateros Water Ditch Company does not agree to carry the water to the plaintiff's land, but agrees only to put measuring boxes at such point as is most convenient to take the water from the ditch, it is apparent that, in order to obtain water, the plaintiff must construct a ditch the distance named across private property of an adjoining owner, across a state road, and across a railroad right of way. It does not appear that any right to do so has ever been obtained.

If we may assume that the plaintiff was not required to construct his ditches, or to obtain the right to do so after defendants refused the water, we think a just measure of damage would be interest on his investment at the legal rate rather than the remote and speculative damages which he demands. This would be interest on \$500 at six per cent per annum, since March 13, 1908, until final judgment is entered, less the maintenance fee for three years, or up to 1912. The judgment of the lower court is therefore reversed, and the cause remanded with directions to enter a decree requiring the defendants to furnish water in an amount of five miners' inches as above stated, and to construct a measuring box at or near the eastern terminus of the ditch at such point as may be designated by the plaintiff; and also to enter a judgment for damages as above stated, together with costs of the action.

DUNBAR, C. J., FULLERTON, MORRIS, and ELLIS, JJ., concur.

[No. 9606. Department Two. February 28, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.
SHERMAN BAILEY, *Appellant*.¹

INTOXICATING LIQUORS—SELLING OR GIVING AWAY—OFFENSES—INFORMATION—SUFFICIENCY. In Rem. & Bal. Code, § 6288, providing that the selling or giving away of spirituous or vinous liquor of any kind, or any essence, extract, compound, or any article whatsoever which produces intoxication, the words "which produces intoxication" refers only to the antecedent essences, compounds, etc.; and an information for giving away "spirituous" liquors need not allege that it "produces intoxication," as all spirituous liquors are intoxicating.

SAME—EVIDENCE—PURPOSE OF PURCHASE—IMPEACHMENT OF WITNESSES. Upon a prosecution for giving liquor to an Indian, the defendant's statement that he bought the alcohol for medicinal use in treating rheumatism, may be impeached by testimony that he made the purchase for "mechanical purposes," where his purpose in making the purchase had a direct bearing upon his intent in giving it to the Indian and whether for use or for carriage as claimed by defendant.

SAME—GIVING LIQUOR TO INDIAN — EVIDENCE — SUFFICIENCY. A conviction of giving liquor to an Indian is sustained, where there was evidence that defendant walked to a wagon with the Indian, concealing a bottle of alcohol under his coat and handed it to the Indian who put it in the front end of the wagon concealed in a gunny sack, although the evidence was denied by the Indian and defendant; the credibility of the witnesses being for the jury.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered February 9, 1911, upon a trial and conviction of giving liquor to an Indian. Affirmed.

O. W. Noble and *Jesseph & Grinstead*, for appellant.

Howard W. Stuhl, for respondent.

ELLIS, J.—The defendant was convicted by a jury of the crime of giving liquor to an Indian. From the judgment and sentence entered upon the verdict, he has prosecuted this appeal.

¹Reported in 121 Pac. 821.

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(1) The first assignment of error rests upon a contention that the information did not charge a crime, in that it failed to state that the liquor given away was of a character "which produces intoxication." The charging part of the information was as follows:

"That on or about the 7th day of September, A. D. 1910, in the county of Stevens, state of Washington, the said Sherman Bailey, then and there being, did then and there unlawfully, wilfully and feloniously give away spirituous liquor, to wit: One bottle thereof to one Joaquin LaFleur, the said Joaquin LaFleur then and there being a mixed blood Indian, and being more than one-eighth Indian."

The statute (Rem. & Bal. Code, § 6288) under which the information was drawn, so far as pertinent to appellant's claim, is as follows:

"Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous or vinous liquor of any kind whatever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label or brand, which produces intoxication . . . shall be guilty of a felony," etc.

It is argued that the phrase "which produces intoxication" is a limitation upon all that part of the section which precedes it; that therefore the failure to describe the liquor, though designated "spirituous," as of a kind "which produces intoxication" was fatal to the information. We cannot so hold. Spirituous liquors are in their nature intoxicating. The term requires no qualifying words to define this intrinsic quality. The qualifying phrase refers only to those essences, compounds, etc. which are enumerated immediately preceding it. Essences, compounds, etc. are not all essentially intoxicating, and therefore these terms required the additional qualification of the phrase to bring them within the plain purpose of the statute, which is to prevent the acquiring by Indians of intoxicants in any form. This interpretation is in accord with the rules of both legal and grammatical construction.

"The term 'spirituous liquors' is not synonymous with the term 'intoxicating liquors,' nor can the two expressions be used interchangeably. All spirituous liquor is intoxicating; but there are varieties of intoxicating liquor which cannot properly be described as spirituous. The latter term is properly restricted to such liquors as are produced by the process of distillation, and does not include wine, ale, beer, or other liquors which are not the product of the still, unless the terms of a statute extend its signification so as to make the term cover liquors which are not etymologically within its meaning." 23 Cyc. 59.

"All spirituous liquor is intoxicating; yet all intoxicating liquor is not spirituous." *Clifford v. State*, 29 Wis. 327; 7 Words & Phrases, p. 6610 *et seq.*; *State v. Reily*, 66 N. J. L. 399, 52 Atl. 1005; *Commonwealth v. Grey*, 2 Gray 501, 61 Am. Dec. 476; *Luther v. State*, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146.

"Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent." 2 Lewis' Sutherland, Statutory Construction (2d ed.), § 420.

In discussing a closely analogous statute, the supreme court of Alabama has said:

"We are inclined to the opinion that this phrase qualifies or refers only to the clause, 'or other liquors or beverages by whatsoever name called,' which immediately precedes it, and which two phrases, taken together, constitute one of the six classes of liquor and beverage the sale of which is prohibited. We are led to this conclusion, not alone by the composition and grammatical construction of this section of the act, but also by a reference to the history of such legislation in this and other states, and the judicial construction put upon the terms 'spirituous,' 'vinous,' 'malt,' and 'intoxicating' liquors and beverages by this and other courts. These terms each had a well defined and accepted judicial construction by the courts, when used in such statutes; and it does not appear that there was any intention to change that well accepted judicial construction. They were severally treated as being well known and defined; but the phrase, 'or other liquors or beverages by whatsoever name called,' is clearly shown not to refer to every well known or defined class, but is intended

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to include any and all other classes or kinds, not embraced in the foregoing five classes named, 'which if drunk to excess will produce intoxication.' " *Marks v. State*, 159 Ala. 71, 48 South. 864, 133 Am. St. 20.

The demurrer to the information was properly overruled.

(2) It is next claimed that the court erred in permitting the introduction of the prescriptions upon which appellant purchased the alcohol, showing that the purchase was represented as for "mechanical purposes," to rebut his testimony that he purchased it for the special purpose of medicinal use in treating muscular rheumatism with which he sometimes suffered. The argument is that the purpose of the purchase being immaterial, his statement in regard thereto was not a proper subject for impeachment or contradiction. It is undoubtedly the correct rule that impeachment or contradiction is not permissible on purely collateral matters. 2 Wigmore, Evidence, § 1001. But here the evidence of which contradiction was sought was not directed to a purely collateral matter. The defendant's testimony as to the purpose of the purchase had a direct bearing upon his intention in giving the alcohol to the Indian, as tending to show that his intent was not to give it to the Indian for his own use, but to entrust it to him for carriage as the defendant claimed. Any evidence tending to contradict or discredit this testimony was therefore admissible.

"A witness' acts variant from his testimony on the stand may ordinarily be shown to impeach him. . . . Where a witness testifies to the ideals, conduct, acts, intent or motives of himself or a body of persons of which he is a member, specific acts of his at variance with his representations may be proved." 7 Ency. Evidence, pp. 149, 150.

The admission of the prescription was not error.

(3) Finally it is contended that the evidence was insufficient to support the verdict. The evidence shows that the defendant lived on the west side of the Columbia river, about three miles north of the Kettle Falls ferry; that the Indian, LaFleur, lived also on the west side of the river, some eight

miles south of the ferry; that they met at the ferry on the morning of September 7, 1910, each on the way from his home to Kettle Falls, the defendant walking and the Indian driving a wagon; that while crossing together on the ferry boat, they engaged in conversation of an immaterial nature; that they both proceeded to the town of Kettle Falls, which is about half a mile from the ferry. They both testified that the defendant asked the Indian, when they met again in town, to carry in his wagon, back to the ferry, the defendant and some twenty-five or thirty pounds of provisions, which defendant claimed he intended to buy; that at about three o'clock in the afternoon, the Indian having informed the defendant that he would soon start for his home, the defendant placed the bottle of alcohol, which he claimed to have purchased for his own use, in the jockey box of the Indian's wagon, and told the Indian he was going to get the balance of his stuff "as you say you are going to hitch up and start pretty shortly." The principal witness for the prosecution, one Charles M. Larson, a merchant of Kettle Falls, testified that he observed the actions of defendant and the Indian at the time. His testimony touching the matter was as follows:

"A. Well, I saw Bailey pull his coat out like this (indicating) and take something from under his coat and hand it to Joaquin LeFlour, and they stood there a moment and then Joaquin takes this parcel and wraps it up in a gunny sack, and that is all there is to it except I said to Joaquin— Mr. Jesseph. I object as incompetent, irrelevant and immaterial and not responsive. The Court. Tell what you saw. A. I saw him hand this parcel to Joaquin LeFlour and Joaquin wrapped the parcel up in a gunny sack and put it in his wagon. Q. What part of the wagon did he put it in? A. In the front end of the wagon. Q. Did you or did you not hear any conversation between Bailey and LeFlour? A. I did not hear any conversation. . . . Mr. Stull: Q. I believe you said that Bailey took the bottle from his coat pocket? A. No, I did not. Q. Where did he take it from? A. From under his coat. I don't think you could get a quart bottle in your pocket. Q. In what manner did he

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give that bottle to him? A. Just carried it under his coat like he was concealing something. That is what caused me to notice it. He took it out like that (indicating) and handed it to Joaquin and he said something to Joaquin and Joaquin wrapped it up in the sack."

Both the Indian and the defendant denied that the defendant carried the bottle concealed under his coat. The defendant was arrested about half an hour later. At that time he had made no further purchase save that of a few cartridges. He testified that he consumed a part of the time visiting friends, though the Indian had told him he would soon start for his home.

We are of the opinion that the evidence was sufficient to sustain the verdict. Its credibility and weight were for the jury. If the jury believed Larson's testimony as to the secretive manner in which the defendant carried the bottle, this, together with the fact that half an hour afterwards he had made no further purchases and was making no apparent preparation to depart with the Indian, was sufficient to justify the jury in finding him guilty. It discredited the only explanation offered for the delivery of the liquor to the Indian. There was evidence tending to establish every element of the crime charged. The trial court having denied the defendant's motion in arrest of judgment and refused a new trial, we must decline to interfere.

"It is difficult to formulate a general rule stating the extent to which appellate courts will pass upon the weight and sufficiency of evidence and reverse because of an insufficiency of evidence, but the general rule seems to be that where there is material evidence tending to prove defendant's guilt before the jury, and the trial court refuses to set their verdict aside, an appellate court will not reverse the action of both the trial court and the jury; that it will examine the record to see whether there is evidence proper to go to the jury, and upon which a verdict of guilt might reasonably be founded, and, being satisfied on that point, will refuse to interfere, whatever may be its own opinion of the weight or preponderance of the evidence. If, however, the verdict of

the jury is altogether unsupported by any evidence whatever, or if it is against the evidence and every proper inference which is reasonably deducible therefrom, the judgment will be reversed by the appellate court." 12 Cyc. pp. 906, 907, 908.

See, also, *State v. Bailey*, 31 Wash. 89, 71 Pac. 715; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 867; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *Miller v. Territory*, 9 Ariz. 123, 80 Pac. 321; *Kennon v. Territory*, 5 Okl. 685, 50 Pac. 172; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *People v. Williams*, 133 Cal. 165, 65 Pac. 323.

We find no error in the record which would warrant a reversal. The judgment is affirmed.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 10056. Department One. February 29, 1912.]

JOHN ANDERSON, *Respondent*, v. HURLEY-MASON COMPANY,
Appellant.¹

DAMAGES—PERSONAL INJURIES—FUTURE PAIN—INSTRUCTIONS. In an action for personal injuries, it is not error to instruct that the jury may take into consideration any future pain that he will suffer in consequence of his injuries, instead of such future pain as he might reasonably be expected to suffer.

DAMAGES—PERSONAL INJURIES—MEDICAL EXPENSES—INSTRUCTIONS. In an action for personal injuries in which there was no evidence of expense for medical services, it is not prejudicial error to instruct that the jury may include such reasonable sum as the evidence shows he has been or may hereafter be called upon to expend for physicians and surgeons.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered July 3, 1911, upon the verdict

¹Reported in 121 Pac. 815.

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of a jury rendered in favor of the plaintiff for personal injuries sustained by an employee. Affirmed.

Hayden & Langhorne, for appellant.

Gordon, Easterday & Askren, for respondent.

Gose, J.—This is a suit to recover damages for personal injuries, sustained by the plaintiff while in the service of the defendant. There was a verdict and judgment for the plaintiff for \$2,500. The defendant has appealed.

The court gave to the jury, among other instructions, the following:

“If from the evidence and these instructions you consider the plaintiff is entitled to recover, then you will proceed to fix the amount of damages to be awarded him. In doing so you should take into account the nature and extent of his injuries, the pain and suffering which he has endured, the loss of time heretofore sustained by him on account of his injuries, the effect that his injuries will have upon his earning capacity in the future, the permanency or otherwise of his injuries and any future pain which he will suffer in consequence of them and any deprivation of ability to enjoy life, as may be shown by the evidence. You may also include such reasonable sum as the evidence satisfies you he has heretofore been or may hereafter be called upon to expend for physicians and surgeons.”

The appellant earnestly contends that the instruction quoted is erroneous in at least two respects; (1) it is said that the court should have instructed the jury that it might take into account any future pain which the respondent might reasonably be expected to suffer in consequence of his injury, and that the words “which he will suffer” make the instruction erroneous; (2) that the court erred in instructing the jury: “You may also include such reasonable sum as the evidence satisfies you he has heretofore been or may hereafter be called upon to expend for physicians and surgeons.” We will consider these propositions in the order stated.

We think the first assignment is highly technical. In

criticizing this part of the instruction, counsel relies upon the case of *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916. In that case the court instructed the jury that they were authorized to compensate the plaintiff "for pain and suffering which he *may* endure in the future." The court said that was not the rule, but that he was entitled to recover for such future pain and suffering "as are reasonably certain to result from the injury." There is a wide difference in meaning, however, between the instruction in the *Ongaro* case and the instruction given in the case at bar. The instruction in this case is supported by the rule announced in *Harris v. Brown's Bay Logging Co.*, 57 Wash. 8, 106 Pac. 152. In that case an instruction was approved which permitted the jury to compensate the injured party for "his suffering and pain which he has undergone and which you think probable from the testimony he will experience in the future." The word "will" used in the present instruction puts a heavier burden upon the injured party than was put upon him by the instruction in the *Ongaro* case, and is a stronger word than the word "probable" approved in the *Harris* case. Indeed, it may be safely said that the instruction complained of bears harder upon the respondent than would the words "such as are reasonably certain to happen." There is no evidence that the respondent incurred any expense for medical services.

The second contention we think is also without merit. The language criticized is in principle supported by *Niemyer v. Washington Water Power Co.*, 45 Wash. 170, 88 Pac. 103; *Webster v. Seattle, Renton etc. R. Co.*, 42 Wash. 364, 85 Pac. 2; *Cole v. Seattle, Renton etc. R. Co.*, 42 Wash. 462, 85 Pac. 3, and *Neal v. Phoenix Lumber Co.*, 64 Wash. 523, 117 Pac. 267. In the *Niemyer* case, the jury were instructed that, if their verdict was for the plaintiff, they might allow him such expenses as he had incurred for medical attention, "if any is shown by the testimony in the case." It was argued that this instruction was erroneous, because there was no evidence as to the value of the medical services rendered

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to the respondent. We held that the effect of the instruction was to direct the mind of the jury to the fact that such expenses were compensatory and allowable only when based upon the evidence in the case. In the *Neal* case, the court, in instructing the jury as to the damages that could be recovered by a minor in consequence of the loss of her father, failed to consider the contingency of the daughter's death before she reached the age of eighteen years. This was urged as error on appeal. But we held that the argument was technical; that the jury knew as well as the court the uncertainty of human life, and that it no doubt considered the instruction in the light of the contingency. In *Mighel v. Stone*, 175 Ill. 261, 51 N. E. 906, a suit by the father to recover damages for the seduction of his daughter, the court included, as an element of damages, "money necessarily paid out or incurred by him for physicians' services and medicines, if any are shown by the evidence." There was no proof either of a payment or of a promise to pay for such items. It was held that the instruction was "defective," but that as limited by the words "if any are shown by the evidence," it would not on a mere incidental matter mislead the jury or work harm to the defendant.

The appellant relies on the following cases: *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400; *Grays Harbor Boom Co. v. Lonsdale*, 54 Wash. 88, 102 Pac. 1041, 104 Pac. 267; *Brown v. White*, 202 Pa. 297, 51 Atl. 962; *Scott v. Banks*, 60 N. Y. Supp. 397; *Pumphrey v. St. Louis etc. R. Co.*, 14 Tex. Civ. App. 455, 37 S. W. 360; *Chicago, St. L. & P. R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1; *Reed v. C., R. I. & P. R. Co.*, 57 Iowa 23, 10 N. W. 285. The instruction in the *Olson* case was held erroneous because it was thought the court assumed, "that there was evidence before the jury justifying a finding in favor of the respondent" for indebtedness incurred for medical or surgical attendance, hospital services, etc., when there was in fact no such evidence. We think the instruction there given justified that

interpretation, and in that respect it is unlike the instruction at bar. In the *Lownsdale* case, the judgment was reversed because the trial court permitted improper elements of damages to be injected into the case, and because it was thought the verdict returned could not have been found without accepting wrong elements of damages. In the *Brown* case, there was no evidence showing the amount of money expended for medical services, and the trial court permitted the jury to determine that question without evidence. The language of the instruction is not set forth. In the *Scott* case, the court instructed the jury that there was no evidence in the case of any pecuniary loss, except such as they might infer from the services of the physicians. This was held error. It is apparent that there is little resemblance between that instruction and the instruction criticized in this case. The *Pumphrey* case, supports the appellant's contention. In the *Butler* case, the jury (without any evidence on the question) was instructed that, in determining the damages, it should consider the "expenses of curing or attempting to cure himself." This was held error, the court saying that, "it is error to instruct the jury as if there was evidence in the case in support of that averment." In the *Reed* case, the court instructed the jury that, if it found the plaintiff was entitled to recover, it should allow for "expenses reasonably incurred for medical care and attention." There was no evidence as to any such expenses. The court said: "They doubtless would feel authorized to determine the amount to be allowed therefor according to their own judgment without aid of evidence." The instruction in this case limits the recovery to such reasonable sum as the evidence shows to have been expended. We think it may be fairly said of the instruction that it warned the jury that there could be no recovery for the items mentioned unless the evidence justified it.

It is not contended that the evidence is insufficient to support the verdict, or that the verdict is excessive. We have,

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however, read the evidence, and it is apparent that, if the jury credited the testimony of the respondent and his witnesses, the verdict returned will hardly compensate him for the injuries he has sustained.

The judgment is affirmed.

DUNBAR, C. J., CROW, and PARKER, JJ., concur.

[No. 9713. Department Two. March 2, 1912.]

W. A. WILSON, *Appellant*, v. J. E. FRASER *et al.*,
Respondents.¹

APPEAL—RIGHT TO APPEAL—CESSATION OF CONTROVERSY—COSTS. An appeal in an action to determine the title to office will be dismissed, where prior to the hearing on appeal, the term of office has expired leaving no subject-matter in controversy except the issue of costs.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered June 5, 1911, upon the pleadings and an agreed statement of facts, dismissing an action to try title to office. Appeal dismissed.

Martin & Wilson, for appellant.

James S. Freece and *C. A. Pettijohn*, for respondents.

MORRIS, J.—Appellant brought this action to determine his right to the office of councilman from the third ward of the city of Davenport, and appeals from an adverse judgment.

Appellant was elected to fill a vacancy occurring July 13, 1910, and there is some question as to whether the term to which appellant was elected expired in December, 1910, or on January 2, 1912. Assuming, but not holding, that appellant would hold until January 2, 1912, the term would have expired before the appeal was heard in this court;

¹Reported in 121 Pac. 829.

leaving no subject-matter upon which the judgment of this court could operate, and making costs the only issue now involved. Upon this ground, respondents move to dismiss the appeal.

The motion must be granted. Courts will not concern themselves with academic questions, nor hear and determine abstract questions of law in order to determine as between the parties who shall pay the costs. This rule is so well settled we content ourselves with simply citing the authorities sustaining it. *State ex rel. Coiner v. Wickersham*, 16 Wash. 161, 47 Pac. 421; *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424; *State ex rel. Scottish-American Mortgage Co. v. Meacham*, 17 Wash. 429, 50 Pac. 52; *State ex rel. Land v. Christopher*, 32 Wash. 59, 72 Pac. 709; *State ex rel. Cawley v. Bremerton*, 32 Wash. 508, 73 Pac. 477; *Holppa v. City Council of Aberdeen*, 34 Wash. 554, 76 Pac. 79; *Lamona v. Odessa State Bank*, 35 Wash. 113, 76 Pac. 534; *State ex rel. Taylor v. Cummings*, 27 Wash. 316, 67 Pac. 565.

The appeal is dismissed.

DUNBAR, C. J., FULLERTON, ELLIS, and MOUNT, JJ., concur.

[No. 9918. Department Two. March 4, 1912.]

A. B. PARKER, *Respondent*, v. MINNESOTA LINSEED OIL PAINT COMPANY, *Appellant*.¹

APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence, submitted under proper instructions, will not be disturbed on appeal, where there is substantial evidence to support it.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 28, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

¹Reported in 121 Pac. 824.

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Opinion Per MORRIS, J.

A. D. McLaren, for appellant.

R. M. Webster and *Fred M. Williams*, for respondent.

MORRIS, J.—In this action respondent sought to recover \$15,000, which he claimed to be due him under a contract with appellant whereby, from July 15, 1906, until December 31, 1909, he acted as manager of appellant's business at Spokane. Appellant denied any indebtedness to respondent, and set up a counterclaim, seeking to recover \$3,000 from respondent as general damages because of his negligent management of the business, and five items of special damages amounting to \$263.03. These issues were, upon the trial, submitted to a jury, and a verdict returned in favor of respondent for \$9,000. A new trial having been denied, the case is brought here on appeal.

The case is peculiar, inasmuch as no assignment of error is made based upon the admission or rejection of evidence, or any instruction given or refused; the two claims of error here urged being, insufficiency of the evidence to justify the verdict, and that the verdict is excessive. The failure to make other assignments of error is not due to any neglect of counsel, but arises from the fact that the case was well and cleanly tried by counsel, and was submitted by the court to the jury in clear and comprehensive instructions to which no possible objection could be taken. The assignments of error here made have necessitated a careful reading of the record and examination of the accounts; and while, as in most cases where the verdict is arrived at from a review of mutual accounts of several years' standing, it is difficult to determine what figures were used by the jury as the basis of its verdict, because it is impossible to tell from all these disputed items the ones the jury accepted and the ones it rejected; it is nevertheless evident that the verdict is well within the evidence. If the jury accepted all of respondent's contentions, and gave him the benefit of all the disputed items, a verdict for a larger sum than \$9,000 would have

resulted. So that we cannot say the verdict is excessive, nor that the evidence is insufficient to sustain it.

It will not be necessary to cite authorities in support of the rule that, where the question is one of fact, and competent evidence is submitted to the jury under proper instructions, the verdict must stand. There must, of course, be a real conflict and substantial evidence to support the verdict. When these conditions exist, the weight of the evidence and the acceptance or rejection of facts must rest with the jury as the sole judge of the facts. In this case there was a real conflict between the parties, (1) as to what the original contract of employment was, and (2) whether there had been any modification or change in a meeting between the parties at Minneapolis in November, 1907. There was little or no dispute between the parties as to the items of account properly to be considered by the jury in arriving at the verdict, the main dispute being as to how these items should be credited and debited to the respective parties, and this must be largely determined by the conclusion as to what the contract was. So that we find substantial evidence to justify a verdict upon a real conflict, with no improper admissions or rejections of testimony, and with instructions clearly and aptly stating the law. Under such circumstances, there is nothing an appellate court can do. The verdict, being well supported by the evidence, must be accepted as the final arbitration of the rights of the parties litigant.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and ELLIS, JJ., concur.

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Opinion Per MORRIS, J.

[No. 10036. Department Two. March 4, 1912.]

WELLS & MORRIS, *Appellant*, v. J. T. BROWN *et al.*,
Respondents.¹

FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL UNDERTAKING. Where a contractor for dwellings sublet the plumbing, and failed to pay for the work, the owner's oral promise to the plumber to pay him, if he would not file a lien against the premises, is an original undertaking, and not a promise to answer for the debt or default of another within the statute of frauds.

SAME—ORIGINAL UNDERTAKING—CONSIDERATION—SUFFICIENCY. An agreement not to file a mechanics' lien against property is a sufficient consideration for the oral promise of the owner to pay for the work, so as to make the promise an original undertaking and not within the statute of frauds, and it is immaterial that the right to file the lien could have been contested for failure to comply with the statute relating to duplicate statements of the material furnished.

APPEAL—RECORD—TRANSCRIPT—SUPPLEMENTAL TRANSCRIPT—JURISDICTION—TIME FOR TAKING APPEAL—MOTION FOR NEW TRIAL. Where the original transcript failed to show the filing marks below that would make the appeal within time to give jurisdiction, it may be shown by a supplemental transcript that the time for taking an appeal was suspended by the pendency of a motion for a new trial seasonably made, and time for taking an appeal would run from the denial of the motion, and not the date of the judgment.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered May 6, 1911, upon the verdict of a jury rendered in favor of the defendants by direction of the court, dismissing an action on contract. Reversed.

Martin & Barrows, for appellant.

Reeves, Crollard & Reeves, for respondents.

MORRIS, J.—Sometime in March, 1910, the respondents entered into a contract with E. D. Utter to build two cottages. Utter sublet the plumbing to the appellant. He failed, however, to pay appellant the agreed price for the

¹Reported in 121 Pac. 828.

plumbing, and appellant sought to obtain the amount due from respondents. It is alleged in the complaint that appellant was about to file a lien upon the property for the amount it claimed to be due, when an agreement was entered into between appellant and respondent J. T. Brown, wherein Brown did orally promise, in case appellant did not file its claim of lien, he would pay appellant the sum of \$348.10, the amount of its claim; that, relying upon the promise to pay, appellant permitted its time for filing lien to expire, when respondents refused to pay the claim, and the action was brought. The defense was a general denial. Upon the trial, the court, upon respondents' motion, directed a verdict in their behalf, and this appeal follows.

The ground urged by respondents in support of the motion was that the promise proved by appellant was one to answer for the debt of another, and within the statute of frauds. It will not be denied that any oral promise whereby one binds himself to answer for the debt of another is within the statute of frauds. It is equally well established that, when the promisor, for a valuable consideration, assumes to pay a debt contracted by another, he may, by his language, make the debt his own, and assume an original and not a collateral undertaking. This was, we think, the character of the promise pleaded and proved by appellant. Mr. Wells testified that J. T. Brown came into the office of appellant and was told that Utter had failed to pay the account, and that, unless it was paid promptly, a lien would be filed, and that Brown then said he did not want any lien filed against his property, "and if we would give him a little additional time, that he would pay the account. I told him that would be satisfactory," and that, relying upon this promise of Brown, he did not file a lien, and let the time for such filing elapse. This conversation was corroborated by Morris. Utter also testified that Brown told him that he would pay the Wells & Morris account. The conversation with Utter is not relied upon, other than for its corroborative value upon

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the promise made direct to appellant. If Brown used the language attributed to him by Wells and Morris, his promise was an original one, the debt thus became his own, and is not within the rule of the statute of frauds. We have so often held that such a promise is an original one to answer for one's own debt, and hence not within the statute, that it will not be necessary to say anything further, except to refer to the cases where such rule has been applied. *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; *Norby v. Winsor*, 24 Wash. 535, 64 Pac. 726; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101; *Gay v. Schaefer*, 52 Wash. 269, 100 Pac. 334; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123; *Burns v. Bradford-Kennedy Lumber Co.*, 61 Wash. 276, 112 Pac. 359; *Goldie-Klenert Distributing Co. v. Bothwell*, ante p. 264, 121 Pac. 60.

The relinquishment of the right to file the lien upon respondents' property was a sufficient consideration to support the promise. 29 Am. & Eng. Ency. Law (2d ed.), 934; 20 Cyc. 192. In this connection, respondents contend that appellant was not entitled to a lien, for failure to comply with the statute requiring materialmen, before a claim for material is enforceable as a lien, to deliver duplicate statements of the material to the owner. It is immaterial whether appellant was entitled to a lien or not. Respondents chose not to contest it, nor rely upon any defense they might have had to its enforcement, and they cannot now impeach it. *Crans v. Hunter*, 28 N. Y. 389; *Seaman v. Seaman*, 12 Wend. 381; *Stewart v. Ahrenfeldt*, 4 Denio 189; *Fish v. Thomas*, 5 Gray 45, 66 Am. Dec. 348; *Young v. French*, 35 Wis. 111; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884.

Respondents move to dismiss the appeal, upon the ground that the record does not show jurisdiction in this court, in that the appeal was not taken within time. The original

transcript here filed failed to show the filing marks below, so that it could not be told within what time the notice of appeal or bond was filed. It also showed the entry of judgment May 6, 1911, and notice of appeal August 14, 1911. This would make the appeal too late. A supplemental transcript, however, shows these filing marks, and a motion for a new trial filed May 1 and denied June 1. This would make the appeal within time, as we have uniformly held that, when a motion for a new trial was seasonably made, the time for appeal would run from the denial of such motion. *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839; *State ex rel. Payson v. Chapman*, 35 Wash. 64, 76 Pac. 525; *Kubillus v. Ewert*, 40 Wash. 38, 82 Pac. 147; *Wittler-Corbin Mach. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629; *Chilcott v. Globe Nav. Co.*, 49 Wash. 302, 95 Pac. 264.

It follows from what we have said that the court below was in error in directing a verdict for respondents. The cause should have been submitted to the jury, under appropriate instructions to find for plaintiff or defendant as they might determine the fact as to the making of the promise alleged and testified to by appellant and its witnesses. The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., MOUNT, FULLERTON, and ELLIS, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 10091. Department Two. March 7, 1912.]

THE STATE OF WASHINGTON, *on the Relation of The
Adjustment Company, Plaintiff*, v. THE SUPERIOR
COURT FOR KING COUNTY, *Respondent*.¹

PARTIES—BRINGING IN NEW PARTIES—ASSIGNMENTS—EQUITABLE DEFENSES AGAINST ASSIGNOR. In an action upon an assigned account, where the defendant sets up equitable defenses seeking equitable relief against the assignor, the court has power to require the assignor to be made a party to the end that a complete determination of the controversy may be had, under Rem. & Bal. Code, § 273, giving the defendant the right to set forth legal or equitable defenses, and § 196, authorizing the court to bring in the real parties in interest.

Application for a writ of certiorari to review an order of the superior court for King county, Myers, J., entered December 2, 1911, staying proceedings in an action until additional parties were brought in. Writ denied.

Leopold M. Stern, for plaintiff.

Arthur E. Griffin, for respondent.

CHADWICK, J.—The Adjustment Company, a corporation, brought suit against the Pacific Knitting Mills, a corporation, in the superior court of King county, to recover a balance due upon the price agreed to be paid for certain attachments, to be used on knitting machines, sold by Ellsworth L. Ward and George J. Wolf, operating under the trade-name of Climax Machine Company. Interrogatories were propounded by the defendant, and it is made to appear by the answers thereto that no consideration passed from the Adjustment Company for the assignment of the account, and that its only interest is that of a collection agency to collect the balance due. The Pacific Knitting Mills answered, setting up several defenses; among others, that The Adjustment Company is not the real party in interest, and that

¹Reported in 121 Pac. 847.

the attachments are patented articles controlled by the Climax Machine Company; that they were not furnished as contracted, and that they cannot be secured elsewhere; that it has been greatly damaged because of the breach of the contract; and praying, *inter alia*, that it be allowed its damages sustained, and that Ward and Wolf be brought in as parties and be by the court required to specifically perform their contract. The court thereupon, on motion of the Pacific Knitting Mills, made an order requiring that all proceedings be stayed until Ward and Wolf could be brought in as parties. Whereupon The Adjustment Company filed an original application in this court for a writ of certiorari, directed to the superior court of King county (H. A. P. Myers, judge), to review its order.

Waiving other questions raised by the parties, we are convinced that the writ should not issue, notwithstanding this court has uniformly held that an assignee of an account or chose in action could maintain a suit in his own name, although such an assignment is made for the purpose of collection only, and the assignee had no other interest in the thing assigned. The sum of our holdings is that an assignee has sufficient interest to maintain the suit. *Conaway v. Co-Operative Homebuilders*, 65 Wash. 39, 117 Pac. 716; *Von Tobel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 Pac. 788; *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209; *Riddell v. Prichard*, 12 Wash. 601, 41 Pac. 905; *Barto v. Seattle & International R. Co.*, 28 Wash. 179, 68 Pac. 442.

In such cases, however, the defendant may avail himself of any defense or set-off existing against the assignor at the time the assignment was made. Rem. & Bal. Code, § 265; 15 Ency. Plead. & Prac., 709. Such defenses will not, however, support an affirmative judgment. They operate only as a bar to the present action. The same authority (Rem. & Bal. Code, § 191) which sustains the right of an assignee to sue at law in his own name also gives the right to a defendant to "set forth by answer as many defenses and counterclaims

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Syllabus.

as he may have, whether they be such as may have heretofore been denominated legal, or equitable, or both." Rem. & Bal. Code, § 273. It follows, then, that the nature of the action may be changed by the answer from a simple action at law into one to be resolved by reference to equitable principles. This being so, it is within the power, if indeed it is not the duty, of the court, upon a proper showing, to bring in the real parties in interest, to the end that a complete determination of the controversy may be had. Rem. & Bal. Code, § 196. To state the rule is to suggest its reason, for if it were otherwise or as contended by relator, it would operate to cut off equitable defenses entirely; for it may be assumed that non-resident owners of accounts or choses in action, as are the assignors in this case, being apprised of the possibility of an equitable defense supporting an affirmative judgment, would assign their claims, thus leaving a defendant remediless in courts of his own domicile.

Writ denied.

DUNBAR, C. J., MORRIS, CROW, and ELLIS, JJ., concur.

[No. 10098. Department One. March 7, 1912.]

JOHN D. BAER, *Respondent*, v. DAVID CHAMBERS, *Appellant*.¹

MALICIOUS PROSECUTION—REASONABLE CAUSE—ADVICE OF PROSECUTING ATTORNEY—QUESTION FOR JURY. In an action for malicious prosecution the court cannot decide, as a matter of law, that defendant was justified by the advice of the prosecuting attorney, where there was evidence warranting the jury in concluding that the defendant did not fully and truthfully communicate to the prosecuting attorney all the material facts within his knowledge bearing upon the plaintiff's guilt, but without excuse withheld facts from which the prosecuting attorney would have advised against making the charge; the question of reasonable cause for the prosecution being in such case a question for the jury.

SAME—DAMAGES—EVIDENCE—ADMISSIBILITY—WEALTH OF DEFENDANT. In an action for malicious prosecution, evidence of the finan-

¹Reported in 121 Pac. 843.

cial worth of the defendant is inadmissible in this state, where punitive damages are not recoverable.

SAME—EVIDENCE—ADMISSIBILITY—NEWSPAPER ACCOUNTS. In an action for malicious prosecution, plain newspaper accounts, without comment, of the prosecution and arrest of the plaintiff are admissible in evidence; but where defendant was not responsible for such articles, all matters therein save facts that could be ascertained from the complaint charging the offense and the proceedings had thereon are irrelevant and inadmissible where they would tend to prejudice the defendant before the jury.

SAME—DAMAGES—PROBABLE RESULT OF ARREST—EVIDENCE—ADMISSIBILITY. In an action for malicious prosecution, the amount of the recovery cannot be enhanced by evidence that the plaintiff caught cold while in jail, that not being the probable result of his arrest, where there was no evidence showing the bad or unhealthful condition of the jail; although evidence of the condition of the jail is admissible.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered July 3, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for malicious prosecution. Reversed.

Bigelow & Manier, for appellant.

E. N. Steele and Troy & Sturdevant, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court for Thurston county to recover damages which he alleges resulted from the malicious prosecution of a criminal action against him by the defendant. A trial before the court and a jury resulted in a verdict and judgment against the defendant for the sum of \$850, from which he has appealed.

In August, 1910, appellant made complaint in writing under oath before a justice of the peace, for Thurston county, charging respondent with the crime of feloniously assaulting him. A warrant of arrest was thereupon issued accordingly, and placed in the hands of the sheriff of Thurston county, who arrested respondent in obedience thereto, and held him in custody in the county jail for the period of three days. A

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preliminary hearing upon this criminal charge was then held before the justice as a committing magistrate, when respondent was discharged and his further prosecution abandoned.

It is first contended in behalf of appellant that the trial court erred in denying his motion for a directed verdict in his favor. The only argument made in support of this motion which we deem it necessary to notice is that the facts proven were such as to call for a decision of the court, as a matter of law, that appellant had, prior to the making of the complaint before the justice, fully and fairly stated to the prosecuting attorney of Thurston county all of the facts within his knowledge bearing upon the question of respondent's guilt, and had thereupon been advised by the prosecuting attorney that there was cause for believing respondent guilty, and to warrant his prosecution for the crime which was thereafter charged against him by appellant. It is conceded that appellant communicated certain facts to the prosecuting attorney, which standing alone would tend strongly to show respondent's guilt, and that the prosecuting attorney based his advice solely upon the facts so communicated. There were, however, other facts which the jury might well believe from the evidence in this case were within the knowledge of appellant at the time he sought the advice of the prosecuting attorney and made complaint before the justice, which facts tended to show that respondent at the time of the alleged assault was defending his own home from intrusion by appellant, and which facts if true would constitute a perfect defense to the charge made by appellant against respondent. Indeed, it appears by the prosecuting attorney's own testimony that he would have advised appellant against the prosecution had these facts been communicated to him by appellant. Counsel for appellant rely upon the decisions of this court in *Simmons v. Gardner*, 46 Wash. 282, 89 Pac. 887, in support of their contention that the question of reasonable cause should have been decided, as a matter of law, in favor of the appellant by the court, because of the advice of the

prosecuting attorney. In that case, however, there seems to have been no question but that all of the facts known to the prosecuting witness were communicated to the prosecuting attorney, who advised the prosecution therein involved. Touching the question of when such communication to the prosecuting attorney, and his advice thereon, may enable the court in a malicious prosecution case to determine the question of probable cause, as a matter of law, the court, at page 287, said:

“It is undoubtedly the law that if any issue of fact exists, under all the evidence, as to whether the appellants did fully and truthfully communicate to the attorneys consulted all the facts and circumstances within their knowledge, then such issue of fact must be submitted to the jury with proper instructions from the court as to what will constitute probable cause, and the existence or nonexistence of probable cause must then be determined by the jury. *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697. On the other hand, if it appears that the statements as to the attorneys were truthful, full, and complete, giving all material facts and circumstances within the knowledge or information of appellants, then the existence or nonexistence of probable cause becomes a question of law for the court, which should not be submitted to the jury.”

Now in the case before us, it is neither admitted nor proven, beyond controversy, that appellant fully and truthfully communicated all the facts within his knowledge to the prosecuting attorney bearing upon the question of respondent's guilt of the crime for which appellant sought to have him prosecuted. But, on the contrary, there is ample evidence to warrant the jury in believing that appellant withheld from the prosecuting attorney, without excuse, material facts which would have shown respondent's innocence of the charge. We think it follows that the question of reasonable cause could not have been determined by the court, as a matter of law, because that question depended upon facts in dispute, and was therefore for the jury's determination under proper instructions.

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Appellant was called as a witness in behalf of respondent, and over the objections of his counsel, was required to give testimony relative to the amount of property possessed by him, resulting in the jury learning that he was a man of considerable means. This is assigned as error prejudicial to appellant. The decisions of the courts upon the question of the admissibility of evidence of this nature, in this class of cases, are apparently in serious conflict. Such evidence seems to be held admissible in most of the states where punitive or exemplary damages are recoverable when resulting from gross negligence or malicious acts; that doctrine being generally assigned as a ground for admitting such evidence. In 26 Cyc. 103, the general rule is stated in harmony with such authorities as follows:

"The action of malicious prosecution being one in which exemplary damages are allowable, evidence of defendant's pecuniary circumstances may be received."

This class of evidence, however, is not admissible in all jurisdictions where punitive damages are recoverable. In *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 32 South. 503, the supreme court of that state, having under consideration the admissibility of evidence of this nature in a malicious prosecution action, makes some very pertinent observations at page 159, as follows:

"The question is not new in this court. It arose, apparently, for the first time, in the case of *Ware v. Cartledge*, 24 Ala. 622, where it was held that evidence of wealth was not admissible for the plaintiff in an action of slander, and it is admitted, that the same rule, if sound, is applicable to a case of malicious prosecution. The court in that case say: 'We are aware that in many actions for torts, in which vindictive damages are allowed to be given by the jury, proof of the value of defendant's estate has been allowed to go to the jury, both in England and the United States, but this rule is by no means universal. Conflicting authorities on the subject are to be found in English and American books. . . . It would seem, that if such proof is allowable in order to aggravate the damages in such cases, when the defendant is

wealthy, common justice would require, that a converse rule should prevail in the case of poor defendants, and they should be allowed to give their poverty in evidence to mitigate the damages. Yet nearly all the books declare, that this is not the case, and common sense revolts at the idea of its adoption. For, sad would be the fate of that country, whose laws conceded to the insolvent bully, seducer, or slanderer, the privilege of perpetrating his wrongs, with comparative impunity, under the assurance that, when sued for his practices, the damages would be graduated to his present ability to pay them, and consequently would be merely nominal. No sound principle of law tolerates such a practice."

See, also, *Brown v. Smallwood*, 86 App. Div. 76, 83 N. Y. Supp. 415. It is worthy of note that in both of those states such evidence is held inadmissible, even though punitive damages are there recoverable. No decision has come to our attention holding such evidence admissible in states where the doctrine of punitive damages does not prevail. This court, in the early case of *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. 842, 11 L. R. A. 689, repudiated the doctrine of punitive damages as unsound in principle. The views there expressed have been consistently adhered to ever since. *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. 1079, 8 L. R. A. (N. S.) 783. This seems to remove the only basis upon which such evidence could be rendered admissible. It seems to us inconceivable that the amount of respondent's damages should be measured by the financial worth of appellant, when respondent has no right to punitive damages. We conclude that the admission of this testimony was such prejudicial error as entitles appellant to a new trial. This renders it necessary to notice some other assigned errors involving questions which are likely to arise upon a new trial.

Counsel for respondent offered in evidence several copies of newspapers published at Olympia, and of general circulation in Thurston county, containing articles purporting to give accounts of the criminal charge made against respondent

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and his arrest at the instance of appellant. These articles were admitted entire in evidence, over objections of counsel for appellant, and their admission is now claimed to be prejudicial error. The rule seems to be well established that newspaper articles containing plain accounts, without comment, of the prosecution and arrest of the plaintiff, may be admitted in evidence in an action in which he seeks damages for such malicious prosecution. This view is well stated by the supreme court of Michigan in *Filer v. Smith*, 96 Mich. 347, 355, 55 N. W. 999, 35 Am. St. 603, as follows:

“The fact of the publication in a newspaper of the fact of plaintiff’s arrest was set up in the declaration; and as tending to show the publicity given to that fact, and consequent injury, the publication should have been admitted. It was a plain, unvarnished account. Its publication was privileged. The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately brought about by intervening agents, provided such agents were set in motion by the primary wrongdoer, or provided those acts causing the damage were the necessary or legal and natural consequence of the wrongful act. The publication was such a natural, usual, and ordinary consequence of defendant’s act that it must be deemed to have been contemplated.”

See, also, *Minneapolis Threshing Mach. Co. v. Regier*, 51 Neb. 402, 70 N. W. 934; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111.

Now in the case before us, there is no evidence indicating that appellant was responsible for any of these publications, save in so far as they stated facts which could be ascertained from the complaint made before the justice charging the respondent with the crime, the warrant of arrest, and his arrest thereunder. In view of these facts, anything else contained in these publications, we think, would be irrelevant, though such additional matters might possibly be rendered relevant if shown to have been published at appellant’s instance. Let us now notice if there were such other matters contained in

the articles as should have been excluded. There were seven different articles so published, some of them were of considerable length and contained accounts with some details of what purported to be a somewhat serious controversy existing between appellant and respondent arising out of a lease of appellant's farm to respondent and appellant's efforts to regain possession thereof. They contained some statements which might be construed to point to respondent's guilt, in addition to the statements of facts which could be learned only from the proceedings before the justice. Such statements would, of course, tend to prejudice appellant's rights upon the trial, since they reflected somewhat upon respondent's character, and yet we have seen that appellant was not proved to be responsible for their publication. It also appeared from these articles that, after the issuance of the warrant of arrest against the respondent, and after he knew of its issuance, appellant caused delay in the making of respondent's arrest, apparently with a view of coercing respondent into a settlement of their differences. These statements in the articles would tend to create in the mind of the reader an impression that appellant was using the criminal process of the courts to right his private wrongs. Such facts going before the jury were prejudicial to appellant, and such statements in these articles were of course only hearsay.

In *Fletcher v. Chicago & N. W. R. Co.*, 109 Mich. 363, 67 N. W. 330, the supreme court of that state, referring to a newspaper article containing prejudicial matters not admissible in evidence, though some of the facts therein stated may have been admissible, at page 368, observed:

"If such an article be so framed that it cannot be read without introducing the objectionable matter, it must be excluded; but it would be competent to have it appear before the jury that the fact of his arrest was published in the paper."

While this statement clearly indicates that irrelevant matter contained in such publications must be excluded, that rule,

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however, we think will not require the exclusion of all the statements found in these articles. For instance, in one of them we find this statement:

“A warrant for the arrest of John D. Baer was issued yesterday afternoon on the complaint of David Chambers by Judge Milton Giles. Baer is charged with assault with a deadly weapon.”

We do not quote this as being the only statement contained in these articles which is admissible in evidence, but to show the nature of those which are admissible. This and similar statements are, of course, such as would naturally be expected to appear in the public press as items of news concerning the prosecution of respondent for the crime charged, and are therefore such as appellant may be held responsible for. While the learned trial court instructed the jury that these articles “are not to be considered by you except to show the fact that plaintiff’s arrest is given publicity,” he did not exclude from the consideration of the jury any particular portions of the articles nor any particular statements therein. In view of the manifest prejudicial effect against appellant of the objectionable portions of the articles, we think the error of their admission was not cured by the court’s instruction, but that all statements contained therein other than those of the character indicated should have been excluded from evidence. This could have been easily accomplished by causing the unobjectionable statements to be read to the jury. They would thereby have gained all the information material to their inquiry, that is, the fact that respondent’s prosecution and arrest had been given publication. Of course, the extent of that publication could be shown by reading the unobjectionable statements from all the papers in which they appeared.

Over the objection of counsel for appellant, respondent was permitted to testify relative to the condition of the county jail in which he was detained while awaiting preliminary examination, and that he caught cold therein, as follows:

"Q. Now what effect did your incarceration in the jail have upon you Mr. Baer? A. Well it made me sick and heartbroken to think of the idea that I lived fifty-six years or over and never got arrested or in the calaboose and then be arrested after I was so old. Fifty-six years old, being arrested and put in jail it humiliated me so I was heartbroken and didn't know hardly what to do. It made me sick with the worry and catch cold, of course, that was a concrete building and concrete buildings are damp and of course I caught cold. Two nights. A cold upon a cold and that wouldn't have hurt me so much as the idea of being humiliated and disgraced myself and my family. . . . Q. You say that you caught cold while you were there, what effect did that have if any upon your physical condition? . . . A. Well it seemed to stay right with me, caused a pain in my head and that has been staying with me ever since and I have been unable to get rid of it."

It is insisted that this was erroneous, since appellant had no control over the officers nor over the jail, and was in no way responsible for the treatment received by respondent while under arrest. Assuming that the prosecution was malicious and without probable cause, it seems clear that appellant would be liable for all damages which might be expected to ordinarily arise as a result of his arrest and imprisonment. This is only the general rule of damages applicable to all cases of tort. The difficulty here is to determine what is the treatment likely to be expected to be accorded to one under arrest as respondent was. What are the probable resulting damages of such arrest and detention? The great weight of authority appears to be that a plaintiff in an action for a malicious prosecution or false imprisonment may show the condition of the jail where he was confined and his treatment therein. *Grimes v. Greenblatt, supra*; 19 Am. & Eng. Ann. Cases, 608. See, also, note in latter volume at page 614. We apprehend, however, that this rule would not permit respondent to enhance the amount of his recovery against appellant by showing such ill treatment heaped upon him while in prison as consisted of acts clearly unlawful on

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the part of the county and its officers. Such treatment is not the natural or probable consequences to be expected to result from his prosecution and arrest. Now in this case, the condition of the jail is not shown to be so bad and unhealthful that it can be said to be unlawful to confine persons therein while under arrest. We conclude, therefore, that this evidence was admissible in so far as it went to show the condition of the jail. The most serious objection to this evidence, however, relates to that part which shows that respondent caught cold while in jail. This affliction of respondent was not a result of his imprisonment which can be said to be a probable expected consequence to flow therefrom; hence, we think, appellant was not responsible for respondent's catching cold, and the admission of that fact in evidence was erroneous. If this were the only error calling for a new trial, we would hardly be inclined to reverse the cause, for the reason that respondent's own evidence indicates that he regards his catching cold of such slight injury that its influence upon the jury in measuring damages must have been infinitesimal. In view, however, of what may occur upon a new trial, we deem it necessary to say this much on the subject. Other errors are assigned which would probably call for discussion if we were not awarding a new trial, but in view of that fact, we think we need not say more.

The judgment is reversed, with instructions to the trial court to award appellant a new trial.

DUNBAR, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 9936. Department One. March 9, 1912.]

GEORGE W. WILLIAMS, *Appellant*, v. THE CITY OF SPOKANE
*et al., Respondents.*¹

APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING. A statement of facts which was not filed until more than four months after entry of the judgment, is too late, and will be struck out on motion.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 28, 1910, upon sustaining a challenge to the sufficiency of plaintiff's evidence, dismissing an action for damages for personal injuries. Affirmed.

J. F. Blake and *A. E. Barnes*, for appellant.

F. B. Morrill, Danson & Williams, A. M. Craven, and
Wm. E. Richardson, for respondents.

PER CURIAM.—This is an action to recover damages for personal injuries. At the close of the plaintiff's evidence, the defendants severally challenged its legal sufficiency, and a judgment was entered in favor of the several defendants for their respective costs. The plaintiff has appealed.

The judgment was entered on February 28, 1910. On March 15 following, the appellant and the respondents, through their respective counsel, stipulated as to the facts "testified to by plaintiff's witnesses." The statement was certified on April 19, by the judge before whom the case was tried, it was filed on July 2 following, and has not been served on any of the respondents. The respondents have moved to strike the statement, on the ground that it was not filed or served within the time prescribed by law.

The motion is well taken. A reference to the dates will disclose that the statement was not filed within thirty days after the entry of the judgment, and that more than four

¹Reported in 121 Pac. 836.

months elapsed before it was filed. The statement will be stricken. Rem. & Bal. Code, §§ 389, 393; *State v. Aschenbrenner*, 45 Wash. 125, 87 Pac. 1118; *McDonald v. Van Houten*, 59 Wash. 593, 110 Pac. 428.

This leaves no question for our determination, and the judgment is therefore affirmed.

[No. 9979. Department One. March 9, 1912.]

INTERNATIONAL MERCANTILE & BOND COMPANY, *Appellant*,
v. SHAW-WELLS COMPANY, *Respondent*.¹

APPEAL—REVIEW—HARMLESS ERROR—TRIAL—ARGUMENT OF COUNSEL. The arbitrary interruption by the court of proper argument of counsel, as going beyond the instructions, will be held harmless error, unless it appears from the whole record that otherwise a different verdict would probably have been returned.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 23, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

Cohn & Rosenhaupt and *Bruce Blake*, for appellant.

Campbell & Goodwin and *J. B. Campbell*, for respondent.

PER CURIAM.—This case was tried upon an issue of fact, and a verdict rendered in favor of the defendant. The only question involved is whether the contract of a sales agent, made without authority, was ratified by the principal, the appellant here. The facts are such that we think it was a question for the jury, thus preventing us from holding, as a matter of law, that the contract was not ratified.

It is complained that the court arbitrarily interrupted counsel for appellant in his argument to the jury, reminding him that he was going beyond the province of an advocate in challenging the law as given by the court in the instructions

¹Reported in 121 Pac. 834.

which had been read to the jury. From the record as we have it, it is doubtful whether the interruption was warranted. It is more likely that the colloquy came through a misunderstanding on the part of the court as to what counsel was saying to the jury. But it does not follow that the judgment should be reversed for this reason. Error, especially when going to a matter collateral to the main issue, must be prejudicial. This court must be satisfied that the act complained of might have influenced the verdict. The conduct of the trial is peculiarly within the province of the presiding judge, and his right to check counsel when, in his judgment, he is pursuing an improper line of argument is unquestioned; and an appellate court will not reverse a judgment unless it appears that the conduct of the judge, taken in connection with the whole record, makes it at least probable that a different verdict would have been returned. We are convinced that the verdict in this case could not have been other than it was, and will not, therefore, presume prejudice. Judgment affirmed.

[No. 10199. Department Two. March 9, 1912.]

THE STATE OF WASHINGTON, *on the Relation of*
Charles T. Peterson, Plaintiff, v. THE SUPERIOR
COURT FOR KING COUNTY, *Respondent*.¹

WITNESSES—SUMMONS—ORDER TO APPEAR—PARTY OR WITNESS. In an action against a corporation, an order requiring a trustee to appear before the court for examination concerning the possession of the books and assets of the company, which the receiver was endeavoring to obtain, is a summons as a witness and not as a party, where the trustee was not a party to the suit.

WITNESSES—ATTENDANCE—POWER TO REQUIRE—DISTANCE FROM RESIDENCE—CONTEMPT. Since, under Rem. & Bal. Code, § 1215, a witness cannot be required to appear out of the county in which he resides and more than twenty miles from his residence, the court has no power to punish him for contempt in refusing to obey an order requiring his attendance.

¹Reported in 121 Pac. 836.

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APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS. An order requiring a witness to show cause why he should not be punished for contempt in failing to appear for examination, is interlocutory and not appealable as a final order.

PROHIBITION—WHEN LIES—CONTEMPT PROCEEDINGS—ADEQUACY OF REMEDY BY APPEAL—RIGHTS OF WITNESS. The remedy by appeal is not adequate and prohibition lies, where the court made an order without authority of law requiring a witness to show cause why he should not be punished for contempt in failing to appear for examination, that he made answer showing the illegality of the summons, that the court was about to erroneously punish him for contempt, and before he could appeal from the judgment of contempt he must be fined and possibly illegally taken from one county to another and imprisoned.

Application filed in the supreme court February 17, 1912, for a writ of prohibition to the superior court for King county, Dykeman, J., to prevent entry of judgment in contempt proceedings. Granted.

Sullivan & Christian and Bates, Peer & Peterson, for relator.

Leopold M. Stern and J. W. Russell, for respondent.

MOUNT, J.—Application for writ of prohibition. It appears that, in October, 1911, an action was begun in the superior court of King county, by the Shull-Day Company, a corporation, against Lucas-Stark Logging Company, a corporation. Afterwards on January 20, 1912, a judgment was entered in favor of the plaintiff and against the defendant in that action for the amount demanded. About that time and in the same action, one B. T. Wood, Jr., was appointed receiver of the defendant corporation. On February 14, 1912, the receiver filed a petition in the cause, alleging that Clarence Lucas, E. G. Spark, and Charles T. Peterson were trustees of the defendant corporation; that the receiver had made diligent effort to obtain possession of the books and assets of the corporation without success, and prayed that the trustees named be required to appear before the court for examination regarding the affairs of said insolvent corporation.

An order was accordingly made, requiring said trustees to appear before the court on February 16, 1912, at the hour of two o'clock, for examination regarding the affairs of said corporation, and to bring with them all books of account and records of the corporation under their control. This order was served upon Mr. Peterson personally in Tacoma, Pierce county, more than twenty miles from where the King county court was held. At the time of this service, Mr. Peterson demanded his witness fees for one day's attendance and mileage. His fees were not paid nor tendered. He did not appear as ordered, but appeared by counsel and made a showing to the effect, that he was not a party to the action; that he was a resident of Pierce county, more than twenty miles from King county where the court was held; that he was served with the order in Tacoma, and when served demanded his witness fees and mileage, which were not paid nor tendered. Upon this showing, his counsel filed a motion for a discharge of the order requiring him to appear as a witness. This motion was denied, and the court thereupon entered an order requiring Mr. Peterson to appear and submit to examination, or show cause on February 23, 1912, why he should not be punished for contempt of court. Mr. Peterson thereupon applied for this writ of prohibition.

There can be no doubt that the relator was summoned as a witness, and not as a party to the action in which the judgment was taken. *Allen v. Stallcup*, 13 Wash. 631, 43 Pac. 884. And there can be no doubt that he could not be required to attend as a witness before any court out of the county in which he resides and more than twenty miles from his residence. Rem. & Bal. Code, § 1215; *State ex rel. Timm v. Trounce*, 5 Wash. 804, 32 Pac. 750. It is plain, therefore, that the order requiring the relator to appear and show cause why he should not be punished for contempt was made without authority of law and erroneously.

It is argued by counsel for the respondent that an appeal will lie from the order made; and also that, in the event the

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relator is adjudged guilty of contempt, an appeal therefrom is an adequate remedy. We are of the opinion that the order of the court requiring the relator to show cause why he should not be punished for contempt, is not an appealable order, because it is not a final order. It is plainly interlocutory, and therefore not appealable. Before the relator may appeal, he must either submit his showing to the court which he has already done, to the effect that he may not be required to appear personally as a witness in the case, or he must refuse to show cause. In either event, the court must enter a judgment against him for contempt, as the order indicates will be done. The rule is well settled that prohibition will not lie where the court is proceeding without jurisdiction when there is an adequate remedy by appeal. The adequacy of the remedy is the test to be applied upon applications for such writs. Delay and expense do not affect the adequacy of the remedy. *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395. In this case, it is apparent that the trial court made the order complained of without authority of law, that the order is not an appealable order, and that the court will adjudge the relator in contempt of court unless this writ is issued. The relator may, no doubt, appeal from a judgment of contempt; but before he may do so he must be fined and possibly taken from one county to another and imprisoned, in direct violation of the statute. Rem. & Bal. Code, § 1215. We are of the opinion, therefore, that such remedy is not adequate.

The writ is therefore granted.

DUNBAR, C. J., FULLERTON, MORRIS, and ELLIS, JJ., concur.

[No. 9824. Department Two. March 9, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. SAM PLASTINO,
Respondent.¹

INFANTS—NEGLECTED CHILDREN—OFFENSES—STATUTES—CONSTRUCTION—EJUSDEM GENERIS. Rem. & Bal. Code, § 2004, providing punishment for the parents or persons having custody of a delinquent child "or any other person responsible for, or by any act" causing or contributing to the delinquency of, such child, is not subject to the rule of *ejusdem generis*, in view of the evident intent of the legislature to make the same apply to others than those *in loco parentis*, and also in view of the rule that where particular words exhaust a class, following general words must refer to some larger class.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 8, 1911, dismissing a prosecution for contributing to the delinquency of a delinquent child, upon sustaining a demurrer to the information. Reversed.

John L. Wiley and M. E. Jesseph, for appellant.

MORRIS, J.—Appeal from a judgment dismissing an information upon sustaining a demurrer. The information charged that:

"Sam Plastino, on the 25 day of March, 1911, . . . did then and there . . . carnally know and abuse one Helen Barto and by said acts and doings . . . contribute to the delinquency and neglect of said Helen Barto, she then and there being a delinquent and neglected female child of the age of seventeen years."

The information was drawn under § 2004, Rem. & Bal. Code, providing:

"In all cases where any child shall be a delinquent or neglected child, as defined by the statutes of this state, the parent or parents or persons having custody of such child, or any

¹Reported in 121 Pac. 851.

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other person, responsible for, or by any act encouraging, causing or contributing to, the delinquency or neglect of such child, shall be fined . . . or imprisoned”

The court below applied the rule of *ejusdem generis* to the statute, and held that the words “any other person” were controlled in their meaning by the specific enumeration of persons in the preceding clause, and for this reason only parents or other persons *in loco parentis* having custody of the child, could be informed against under this statute.

We cannot concur in this ruling. The rule of *ejusdem generis* is to be used with other rules not less important, such as the determination of the evident intent of the law-making body, and does not warrant the courts in confining the operation of the statute within narrower limits than was intended by the law-makers. *In re Lotzgesell's Estate*, 62 Wash. 352, 113 Pac. 1105. It affords a mere suggestion to the judicial mind that, where it clearly appears that the legislature had in mind a particular class of persons or things, the words of general description were not intended to embrace any other than those within the class. Every legislative act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be gathered from the language of the act; and this rule, like every other rule, is to be made use of in ascertaining and giving effect to that meaning, rather than to hamper and restrict, the evident intent of the law-making body. Lewis' Sutherland, Statutory Construction, § 437.

The evident meaning and intent of this act is to protect delinquent children in the hands of all persons. It never was intended by the legislature that the language employed by it in framing the act should be so read as to furnish protection to these children from the sins of their parents or custodians, but permit other persons to escape the consequences of their contribution to the delinquency of the child. It is apparent the legislature was seeking to enact the broadest protection for delinquent children, and to that end it employed language

which, in its judgment, would cover every phase of the child's life, whether at home or abroad. What it desired to accomplish was to protect the child from further delinquency, and to save the child from parents, or other evil-disposed persons. Such being the evident intent of the act, courts should give it effect, and not restrict or limit its application by giving it an interpretation never intended nor anticipated.

Again we have this rule, that, where the particular words exhaust the class, the general words must refer to some larger class. *Matthews v. Kimball*, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; *State ex rel. Walker v. Corkins*, 123 Mo. 56, 27 S. W. 363; *State v. Woodman*, 26 Mont. 348, 67 Pac. 1118.

"While it [rule of *ejusdem generis*] is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing *ejusdem generis* left; and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose." *National Bank of Commerce v. Ripley*, 161 Mo. 126, 61 S. W. 587.

This last rule is applicable to the statute under consideration. The words "parent or parents, or persons having custody of such child," exhaust the class. They embrace all persons in whose charge, keeping, or custody the child may be. No other words are needed to embrace all of such persons. They refer to parents, custodians, guardians and all who stand *in loco parentis*. The class being exhausted by the special words, the general words "or any other person" must be held to have been intended to refer to some other class of persons, and we must go outside of the class included in the special words to find this second class of persons enumerated. This second class embraces persons, neither parents nor custodians, who by any act contribute to the delinquency of the

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child, a clear and separate distinction from the first class, and embraced in the act so as to make it effectual against all persons who aid in the downfall of the child.

For these reasons, we believe the court below was in error in holding these words meaningless, and the judgment is reversed.

DUNBAR, C. J., MOUNT, ELLIS, and FULLERTON, JJ., concur.

[No. 10191. Department Two. March 9, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Preston Mill Company, Plaintiff*, v. I. M. HOWELL, *Secretary of State, Respondent*.¹

CORPORATIONS—LICENSE FEES—FAILURE TO PAY—EFFECT—REINSTATEMENT—STATUTES—CONSTRUCTION. Rem. & Bal. Code, §§ 3715a and 3715b, having provided that a corporation whose name has been stricken from the records for failure to pay its annual license fee might apply, at any time within six months, for reinstatement upon paying all fees and a penalty of \$25, the amendment thereof by Laws 1911, p. 135, by changing the time within which the application could be made from six months to "any time after its name has been stricken," and increasing the penalty to \$100, was intended to render inoperative Rem. & Bal. Code, § 3715d, providing that a corporation failing to make application for reinstatement within six months shall be thereby dissolved; since the acts are purely revenue measures, and the intent of the amendment was to permit reinstatement upon the conditions prescribed at any time, thereby increasing the revenues of the state.

SAME—CORPORATE FRANCHISES—FORFEITURE. Such act does not violate Const., art. 12, § 3, prohibiting the legislature from remitting the forfeiture of any corporate franchise or charter, the striking of delinquent names for failure to pay license fees not being the forfeiture of a franchise or charter within the meaning of the constitution.

Application filed in the supreme court February 16, 1912, for a writ of mandate directing the secretary of state to ac-

¹Reported in 121 Pac. 861.

cept a fee and issue an annual license to a domestic corporation. Granted.

Saunders & Nelson, for relator.

The Attorney General and *J. T. S. Lyle, Assistant*, for respondent.

A. J. Falknor, as *amicus curiae*, contended that the construction placed upon the statute by the executive department is entitled to great weight. *State ex rel. Smith v. Ross*, 42 Wash. 439, 85 Pac. 29; *Regan v. School District*, 44 Wash. 523, 87 Pac. 828; *Pritchard v. Jacobs*, 46 Wash. 562, 90 Pac. 922. The general purpose or spirit of the law must always be held in view. *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243; *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302. This being a remedial statute, it should be beneficially rather than strictly construed. *Becker & Degen v. Brown*, 65 Neb. 264, 91 N. W. 178. Nonpayment of the license is not *ipso facto* a forfeiture of the corporate franchise, within the meaning of Const., art. 12, § 3, but a mere ground of forfeiture which the state can avail itself of only in a proper suit. *Utah N. & C. R. Co. v. Utah & C. R. Co.*, 110 Fed. 879; *Bloch v. O'Conner Min. & Mfg. Co.*, 129 Ala. 528, 29 South. 925; *Ohio Nat. Bank v. Central Const. Co.*, 17 App. D. C. 524; *Detroit v. Detroit & H. Plank Road Co.*, 43 Mich. 140, 5 N. W. 275; *Petition of Philadelphia & M. R. Co.*, 187 Pa. St. 123, 40 Atl. 967.

Post, Avery & Higgins, as *amici curiae*, contended, *inter alia*, that in view of the acts relating to the voluntary dissolution of corporations only in case its debts are paid, it was not the intent of the legislature to bring about an involuntary dissolution by the act of the secretary of state, instead of by the superior court; and creditors should not be deprived of one remedy without furnishing another adequate remedy. *Cooley, Constitutional Limitations* (5th ed.), pp.

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352, 445; *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Howard v. Ross*, 38 Wash. 627, 80 Pac. 819; *Bost v. Cabarrus County*, 152 N. C. 531, 67 S. E. 1066; *Wilson v. Brochon*, 95 Fed. 82; *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341. It is within the province of the legislature to remit penalties that have been imposed at a prior time to the enactment of the act of remission, and this was one of the purposes of the act of 1911. *Coles v. County of Madison*, 1 Ill. 154, 12 Am. Dec. 161; *State of Maryland v. Baltimore & Ohio R. Co.*, 3 How. 534; *Territory ex rel. Castillo v. Perea*, 10 N. M. 362, 62 Pac. 1094. The legislature could permit delinquent corporations heretofore stricken to be reinstated. Cooley, *Constitutional Limitations* (5th ed.), 457, 458; *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446. The word "every" being a general one, should be given a general construction unless there is a clear intent expressed to restrict the meaning. *Encking v. Simmons*, 28 Wis. 272; *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152; *Morgan v. Hamlet*, 113 U. S. 449. Such a construction should be made as will lead to beneficial results and not to absurd or unjust consequences. *Pierce v. City Clerk of Spokane*, 7 Wash. 132, 34 Pac. 428; *Church of The Holy Trinity v. United States*, 143 U. S. 457.

MORRIS, J.—This is an original application for a writ of mandamus to the secretary of state, directing him to accept certain fees from the relator and issue to it a license for the fiscal year ending June 30, 1912. The attorney general appears and files a demurrer on behalf of the respondent, and as all the pertinent facts are embodied in the petition, a question of law is submitted the disposition of which will control the writ.

The relator is a domestic corporation, engaged in the lumber business at Preston, King county, and has been so engaged since its incorporation in 1892. Through the neg-

lect and oversight of its managing officials, it failed to pay to the state its annual corporation license fees for the fiscal years beginning July 1, 1904, and ending June 30, 1911. On September 22, 1911, this fact being discovered, it applied to the secretary of state to be reinstated, paying the sum of \$10 license fee and \$2.50 penalty for the years 1906 and 1907, and \$15 license fee and \$2.50 penalty for the years 1908 to 1912 inclusive. The secretary of state thereupon issued and delivered to the relator license certificates for these years. At the same time, the relator paid the sum of \$100, further penalty for such neglect imposed under the act of 1911. On February 16, 1912, the relator tendered the secretary of state the sum of \$15, in payment of its annual license fee for the year beginning July 1, 1912, and requested a certificate for that year, which was refused. Relator also, at the same time, tendered 25 cents in payment of a duplicate certificate for the year ending June 30, 1912, both of which tenders and requests were denied, and the relator thereupon filed its application for the writ.

In justification of his refusal, the secretary of state quoted to relator an opinion of the attorney general, to the effect that relator was, by operation of law, dissolved as a corporation prior to the issuance of the license certificates September 22, 1911, and that its reinstatement on that date was unlawful. The opinion of the attorney general to the effect above quoted was in response to an inquiry from the secretary of state, in which the secretary justified his issuance of these certificates and the reinstatement of relator, upon the ground that he was familiar with the objects and purposes of the framers of the act of 1911, and had interpreted the law accordingly in reinstating the relator. These facts will be sufficient to determine our answer upon the point involved. In order to do so, it will be helpful to review all legislation affecting the law as it now stands.

The act of 1907, being Rem. & Bal. Code, § 3715, provided, among other things, that the secretary of state should

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strike from the records of his office the names of all corporations which had neglected for two years to pay the annual license fees. The act of 1909, extra session, being Rem. & Bal. Code, § 3715a, provided that any corporation whose name had been stricken for failure to pay its annual license fee for two years might apply to the secretary of state for reinstatement, at any time within six months from the approval of the act or from the time its name had been stricken. Section 2 of the same act, being Rem. & Bal. Code, § 3715b, further provided that any corporation so applying should, in addition to all license fees and penalties then due, pay an additional penalty of \$25, and upon such payment such corporation would be reinstated. Section 4 of the same act, being Rem. & Bal. Code, § 3715d, provided that any corporation failing to make application for reinstatement within the time provided for such reinstatement should be thereby dissolved, and the secretary of state should enter a notation to that effect upon his official records. Sections 3715a and 3715b were amended by the act of 1911, chap. 41, page 135, whereby the six months' limitation, in which reinstatement might be made, was made to read "at any time after its name had been stricken," and the penalty was increased from \$25 to \$100. So that the law, as it now reads, provides that a corporation failing to pay its annual license fees for two years shall be stricken from the records of the office of the secretary of state; that every corporation so stricken may apply at any time thereafter for reinstatement, and when so applying shall be reinstated upon payment of all license fees and penalties then due, together with an additional penalty of \$100. It will be noted that § 3715d, providing for the dissolution of the corporation for failing to apply within the time in which application might be made for reinstatement, which time was six months as fixed in the act of 1909, has now no force, since the act of 1911 changed the time in which such application might be made from six months to "any time after its name had been stricken from the records;" and,

since the dissolution was to take effect at the expiration of the time fixed in which application for reinstatement might be made, and that time is now, under the amendment of 1911, any time after the striking of the name, there is now no time fixed for such dissolution. Section 3715a, as amended by the act of 1911, reads, "any corporation stricken from the records and dissolved as provided in this chapter," may hold meetings and pass resolutions necessary to close out its affairs and such resolution of such "stricken and dissolved corporation" is validated and approved.

There is no provision, however, in this chapter for the dissolution of such corporation, as to how or when it shall take place; the only penalty to the offending corporation provided for in the act being the striking of its name from the official records of the secretary of state. The framers of this act evidently had in mind the provisions of § 3715d, which made provision for dissolution under the act of 1909. But they failed to fix a time in which the provisions of that section could become operative. The result is there is now no time in which this section, the only one containing any provision for the dissolution of corporations for failure to pay license fees, can become operative. When, therefore, relator applied to the secretary of state to accept its license fee, he should have done so, as it had made full compliance with the law, and within the time provided by the law in force at the time the application was made.

In construing legislative acts, we should look to the intent and purpose of the act. These respective acts were not primarily directed against corporations; they were revenue acts pure and simple, and the provisions directed against corporations were for the purpose of enabling the state to enforce the payment of its revenue and not leave it to the voluntary act of the corporation. The purpose of the several acts being determined, such construction should be given to them as will best meet that purpose, and do no violence to the language employed. That this was in the mind of the

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legislature, is apparent from the act of 1911, whereby the time limit was removed and the penalty extended, thus inviting corporations stricken under the provisions of the former acts and remediless because of the six months' limitation, to seek reinstatement and by payment of the increased penalty add to the revenues of the state. The intent of the act being plain and its purpose beneficial, such intent and purpose should not be read out of it by judicial construction, if it can be preserved without doing violence to language or other legislative restrictions.

The attorney general suggests that to construe the act in favor of relator's contention would render it unconstitutional, under § 3, art. 12, of the constitution, prohibiting the legislature from remitting the forfeiture of any corporate franchise or charter. The striking of the names of delinquent corporations and the notation by the secretary of state that they were dissolved for failure to pay license fees, is not the forfeiture of a franchise or charter as meant by the constitution. The meaning of that provision undoubtedly is that corporate franchises shall be governed and controlled by general laws, as provided in § 1 of the same article, and that the legislature shall pass no act which shall extend any franchise created under general laws nor any act which shall restore any franchise which shall have been judicially determined to have been waived, lost or forfeited. A like constitutional provision was construed in *People ex rel. Sabichi v. Los Angeles Elec. R. Co.*, 91 Cal. 338, 27 Pac. 673, and it was held that acts sufficient to cause a forfeiture do not *per se* produce a forfeiture. The corporation continues to exist until the sovereignty which created it shall, by proper proceedings in a proper court, procure an adjudication of forfeiture and enforce it. See, also, *Ormsby v. Vermont Copper Min. Co.*, 65 Barb. 360; *Mickles v. Rochester City Bank*, 11 Paige 118; *Bloch v. O'Conner Min. & Mfg. Co.*, 129 Ala. 528, 29 South. 925; *Utah N. & C. R. Co. v. Utah & C. R. Co.*, 110 Fed. 879; *Detroit v. Detroit & H. Plank-Road Co.*, 43

Mich. 140, 5 N. W. 275; *In re Philadelphia & M. R. Co.*, 187 Pa. St. 123, 40 Atl. 967.

Under the laws of West Virginia, corporations pay an annual license fee of \$10, and it is provided that any corporation failing to pay such license fee shall forfeit its charter, which forfeiture shall be declared by publication by the state auditor. In construing this provision, it has been held that the nonpayment of a license tax, as any other cause of forfeiture, can only be taken advantage of by direct proceedings for that purpose against the corporation. *Greenbrier Lum. Co. v. Ward*, 30 W. Va. 43, 3 S. E. 227. In *Ohio Nat. Bank v. Central Const. Co.*, 17 App. D. C. 524, the court cites the rule of the *Ward* case and adds: "Mere proclamation by an executive officer will not accomplish the result." Rem. & Bal. Code, § 1034, makes express provision for filing an information in the nature of quo warranto against any corporation which has done or omitted any act which amounts to a surrender or forfeiture of its corporate rights and privileges. We are therefore of the opinion that the act of the secretary of state in striking the corporation from the records of his office, or in noting it as dissolved for failure to pay its license fees, was not a forfeiture of the corporation, so that any act of the legislature providing for a reinstatement of such corporation would be void as the remission of a forfeiture.

From this reasoning it follows that relator is entitled to relief, and the writ as prayed for is granted.

DUNBAR, C. J., MOUNT, and ELLIS, JJ., concur.

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Syllabus.

[No. 9926. Department Two. March 9, 1912.]

H. S. JACKSON, *as Administrator etc., Respondent*, v.
BESSIE LAMAR, *as Administratrix etc., Appellant*.¹

GIFTS—INTENT—DELIVERY—NECESSITY. While the law favors the free disposition of property, and the rigor of the earlier cases as to gifts is materially relaxed, a mere expression of an intent or purpose to give is not alone sufficient, and delivery, actual or constructive, is essential.

GIFTS—PRESUMPTION—EVIDENCE. An oral gift is not presumed, but title must be proven by clear, convincing, and satisfactory evidence.

GIFTS—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show a gift by plaintiff's intestate of a wheat crop for the year 1906, and a threshing machine purchased by the deceased in July, 1906, about four months prior to his death, he having a few years previously deeded a valuable wheat farm and made bills of sale of all his personal property to three nephews (the alleged donees) reserving a life estate, where it merely appears that the deceased had stated to a nurse and notary that he had given all his personal property to the boys, and there was evidence of neighboring farmers showing that the boys had been in full control of the farm, and that the wheat receipts had been indorsed to them; especially in view of the fact that, a short time before his death, he had given checks to them closing up his bank account, without making any transfer of the wheat or threshing machine, their management of the farm being consistent with the written arrangement whereby the deceased reserved to himself all the rents and profits, and with his retention of the wheat crop and his purchase of the threshing machine on his own account, and there being no legal evidence that he ever parted with title to the property in dispute, or of any change in the possession thereof.

GIFTS—PROMISE TO MAKE GIFT—PERFORMANCE—ACCEPTANCE. A gift cannot be supported by a promise to make a gift if the donee would come west and take charge of a farm, where the alleged donee, after coming west and acting upon the offer, accepted a deed of gift and a bill of sale of certain property definitely fixing and limiting the relation of the parties; the ownership of the property being fixed by the deed and bill of sale and not by the preliminary offer.

¹Reported in 121 Pac. 857.

TROVER AND CONVERSION—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY. In an action to recover the value of a threshing machine that had been used one season, findings fixing its value at 30 per cent less than its cost are sustained by evidence that it had deteriorated about 30 per cent, in one year's use, although the same witness on cross-examination stated that a lot of harvest machinery would not sell for more than half its cost.

SALE—BILL OF SALE—TITLE—RETENTION OF POSSESSION—EFFECT. A bill of sale reserving a life estate having been delivered and recorded, will pass the title, although the seller retained possession of it until his death.

EXECUTORS AND ADMINISTRATORS—ACTIONS — ASSETS — EMBEZZLEMENT—DOUBLE DAMAGES—STATUTES. One innocently coming into the possession of property under claim of ownership by an alleged gift from the deceased is not liable for double damages under Rem. & Bal. Code, § 1460, providing for double damages if any one shall, before the granting of letters of administration, embezzle or alienate any of the effects of the estate.

Cross-appeals from a judgment of the superior court for Walla Walla county, Brents, J., entered February 7, 1911, upon findings partly in favor of each party, in an action for conversion, after a trial on the merits to the court. Affirmed.

Sharpstein & Sharpstein and *James H. Hull*, for appellant.

Rader & Barker and *T. P. & C. C. Gose*, for respondent.

MORRIS, J.—This action was brought by respondent to recover the value of 21,575 47-60 bushels of wheat, and other personal property, from David Lamar, a nephew of Joseph Lamar, who claimed the right of possession as against the estate, under a claim that the wheat and other property had been given to him and his two brothers by his uncle, during his lifetime. The court below found in favor of respondent as to the wheat, which was valued at \$15,102.50, and a threshing machine valued at \$2,457.91; to which amounts interest was added, on the wheat from May 1, 1907, and on the threshing machine from January 1, 1907, to the date of the finding, January 20, 1911, making a total finding of \$21,538.88 in favor of respondent. The remainder of the

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personal property was awarded David Lamar and his two brothers, and both parties have appealed.

Since the filing of the original briefs here, David Lamar has died and Bessie Lamar, his administratrix, has been substituted in his stead. Much of the controversy here is upon the proper rules of law applicable to cases of this character, as to what constitutes a gift, and the character of evidence demanded by the law to sustain it. We are not disposed to review these contentions, as we believe the law relating to gifts to be well settled and the announcement of the controlling rules will be sufficient. As is said in Thornton on Gifts, § 217:

“What constitutes a gift—what combination of circumstances will bring a case within the legal definition of a gift—is essentially a matter of evidence and not of law; and each particular case must depend upon its own circumstances, and must be such as to authorize the belief that a gift was intended.”

Under the old cases, gifts were looked upon somewhat with suspicion as fruitful sources of litigation, lacking those formalities and safeguards which the law throws around wills, and creating strong temptation to the commission of fraud and perjury. They were not favored by the law, and almost conclusive evidence was required to sustain them. Such, however, is not now the rule. The law regards with favor every man's right to dispose of his property as he will and when he will, and favors as much his disposition by gift, when the intent and the act are clearly established by competent evidence, as though he had undertaken to dispose of his belongings by the stricter formality of a written disposition. We find the rule so stated in *Crook v. First Nat. Bank of Baraboo*, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. 17:

“The law favors free and comprehensive power of disposition by an owner of his property, and the rigor of the earlier cases has been materially relaxed, both as to the subjects of such gifts and as to what will serve as a delivery to make them effectual.”

While it is true the courts have relaxed the rigor of the old rules, they have never departed from holding that something more is required to constitute a gift, either *inter vivos* or *causa mortis*, than the expression of an intent or purpose to give. Evidence of such intent is admissible to prove the act, but it does not constitute the act, and delivery, either actual or constructive, is as essential today as it ever was. The donor must not only signify his purpose to give, but he must deliver, and as the law does not presume that an owner has voluntarily parted with his property, he who asserts title by gift must prove it by evidence that is clear and convincing, strong and satisfactory. Although it may not be true that the law now presumes against a gift, it certainly does not presume in its favor, but requires proof. *Lewis v. Merritt*, 113 N. Y. 386, 21 N. E. 141; *Devlin v. Greenwich Sav. Bank*, 125 N. Y. 756, 26 N. E. 744. The modern rule that, the intention of the donor having been ascertained, great latitude should be given in carrying out that intention, still demands a delivery as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit. *Blake v. Jones*, 1 Bailey's Eq. (S. C.) 141, 21 Am. Dec. 530; *Phinney v. State ex rel. Stratton*, 36 Wash. 236, 78 Pac. 927, 68 L. R. A. 119.

Having, as we believe, correctly stated the law governing cases of this character, we will now notice the evidence upon which appellant relies to sustain the theory of a gift. Joseph Lamar was an old resident of Walla Walla county. He had accumulated about 7,000 acres of land and much personal property. He was a bachelor and, so far as this record goes, had no relatives nearer than Missouri. His age is not given, but it is apparent from the record that he was well along in years. On January 9, 1902, he wrote to his brother at Weston, Missouri, as follows:

"Your note at hand. Can't you send David out and let him see this country. I would like for him come and take charge of my place as I am not able to do it myself. I will

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divide with him as long as I live when I am gone I will let the boys take the place. I have close to 6,000 acres of land that is worth 100,000 thousand or more. I am going down hill all of the time, it is only 4 or 5 days trip to my place. Maby Parte would come out with him and Joseph Lamar. I have 1,200 acres of wheat in this fall. I haven't sold last years crop, 20,000 bushels. Wheat is looking up. I may sell soon."

In response to this letter, David Lamar came to his uncle, and on February 28, 1902, Joseph Lamar executed a deed whereby he conveyed to David Lamar and his two brothers, Joseph and James N. Lamar, a large tract of land, approximating 7,000 acres, reserving and excepting all the rents, issues, profits, and the exclusive right of possession of the lands conveyed for and during his lifetime. On March 17, 1902, he executed a bill of sale of all his horses, cattle, machinery, and all other personal property to the same three nephews, reserving to himself, as in the deed of the real property, the right of full possession during his lifetime, and fixing delivery as at the time of his death. From that time, David Lamar took full charge of his uncle's affairs, and conducted all his business operations, including the management of the farm lands, until the death of Joseph, October 24, 1906. The record does not disclose what became of the 20,000 bushels of wheat Joseph had on hand at the time he wrote the letter of January 9, 1902, nor what disposition has been made of the wheat crops or other products of the farm for the years 1902 to 1905 inclusive, the wheat in issue here being the 1906 crop. On November 25, 1902, Joseph Lamar gave David a check for \$5,000, for what purpose is not disclosed; and on September 10, 1906, about a month and a half prior to his death, he closed his account at the bank by giving David a check for \$2,621.49 and on the same day he executed a deed whereby he conveyed to David eighty acres of land without reservation or exception. The notary who drew the deed and took his acknowledgment, and a nurse who acted as a witness to the deed, testify that, at that time,

he was asked about the disposition of his personal property, to which inquiry he replied in substance that he had given it to David and the boys. Other testimony relied upon is as follows: Harvey Shaw testified that, soon after David came to his uncle (early in 1902), Joseph Lamar said to him, "I sent for him and he came out and I gave him all I had." Ed Shaw testified that in 1905 he went to Joseph Lamar to purchase a ham, and Joseph then said to him, "I have turned everything over to Dave, and he put up this meat to do the farm work," and he did not know whether there was any meat for sale or not. Thomas Hoggerty testified that in 1904 he bought some hogs of Joseph Lamar, and when he came down to pay for them Joseph told him to settle with David; that he also wanted some pasture land, and Joseph told him to see David about it, because he had turned everything over to the boys. M. S. Jones testified he was the purchasing agent of the 1906 wheat crop in issue here; that as it was delivered to the warehouse, receipts were issued; that the first few receipts were issued to Joseph Lamar, and the remainder to David, and that subsequently, when the grain was shipped, the receipts issued to Joseph Lamar were delivered to him with Joseph's indorsement thereon. Edgar Johnson testified that, in August, 1906, he went to Joseph Lamar to purchase some small pigs, and was then told by Joseph that everything had been turned over to Dave, and he would have to see him. Ed Powers wanted to sell some seed wheat in the spring of 1906, and went to see Joseph Lamar and was told to see David about it, as he had control.

This completes the evidence upon which David Lamar relied to sustain a gift of this wheat crop of 1906 and the threshing machine which had been purchased by Joseph Lamar in July, 1906. It seems to us, as it did to the lower court, that it is wholly insufficient for that purpose. It is conceded by all that David, from the spring of 1902, was in full charge of all the business affairs of Joseph Lamar, and

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that from that time Joseph Lamar retired from any active participation in the management of his farm, leaving David in full control. The testimony of the neighboring farmers who sought Joseph, making inquiries as to the purchase of hogs, hams, and wheat, establishes nothing other than that Joseph had placed David in full control and refused to interfere with his management of the farm. The informal acts of Joseph Lamar, such as these conversations referred to, must be interpreted in the light of his formal acts. He had, by his bill of sale, evidenced the relation between these boys and himself as to his personal property. It was subject to his full and absolute possession so long as he lived. He was willing that David should control it and operate it in connection with the farm, but it was to remain in the possession of the old gentleman until his death. The indorsement of the wheat receipts does not prove a gift of the wheat. Such an act is consistent with every other act of Joseph as related by these various witnesses—turning over the control and management of his affairs to David, and the indorsement of the receipts made for the purpose of enabling David to handle the crop and make all arrangements for its sale, without further annoyance to him. There is in none of these related transactions any evidence, of the character required by the law, that Joseph Lamar had given David Lamar and his brothers the proceeds from the sale of the 1906 wheat, nor this threshing machine. All of these conversations, save the one of September 10, 1906, took place prior to the purchase of the threshing machine in July, 1906. If, then, as David seeks to prove by these witnesses, the old gentleman had given him and his brothers, prior to that time, everything he possesses, what need had he for a threshing machine, and why did not David purchase the machine himself if he owned everything else, and not have it purchased in the name of Joseph Lamar? It seems to us this fact is significant, in connection with the bill of sale, executed when David first came west; that it was the intention of all that, while David was

to have full management and control, the old gentleman's lawful possession was not to be disturbed until after his death. The delivery of these two checks to David is strong proof that it was the intention of the old gentleman to give him the money represented by those checks. On the other hand, if the evidence of appellant's witnesses is sufficient to support a gift, David owned all the personal property including the proceeds of the farm, which we assume, since no other source of income is disclosed, was the source from whence came the money in the bank. If David owned the crops, he also owned the money paid in the purchase of those crops; and why, may we ask, did he not deposit the money in the bank in his own name? The fact that it was deposited in the name of Joseph is proof of the fact that Joseph and David both considered it the money of Joseph, and that it would require some special and independent act to transfer that ownership to David. The evidence of the notary and the nurse that, on September 10, 1906, Joseph Lamar told them he had given all his personal property to the boys, is strong presumptive proof of Joseph's purpose and intention to do so. While purpose and intention to make a gift are essential to establish the gift, they alone cannot make a gift. They are strong factors in determining the making of a gift, but until accompanied by some act of delivery either actual or constructive, they are insufficient. No court would establish a gift when the only evidence to establish it was the declaration of the owner that he had given it away. *Evans v. Lipscomb*, 31 Ga. 71.

"Where the subject of a gift is already in the possession of the donee, the law does not require the useless ceremony of a delivery back to the donor in order that the property may be redelivered by him to the donee. It is sufficient to complete the gift that the conduct of the parties should show that the ownership of the property has been changed, that the donee should continue to hold it thereafter as owner, and that the donor has relinquished all claim in his favor." 14 Am. & Eng. Ency. Law (2d ed.), 1019.

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Accepting the above rule, we have here no evidence of any change of possession. David had the management and control, but Joseph had the legal and actual possession of all the personal property. This is evidenced by the bill of sale, and by the bank account in his name. The law will not presume a change of this possession in order to supply the needed evidence of a gift, but will require some evidence upon which to establish it. There is none in this case. Would it be contended for a moment that, upon this record, David could have successfully maintained possession of all the personal property as against the old gentleman, upon the theory it had been given to him? The bill of sale and the checks would have been sufficient to refute any such claim. To hold that there was a gift of this wheat and this threshing machine, we must find from this record we have quoted when the old gentleman was divested of his right of property, and when David was invested with it; when the old gentleman parted with his present and future dominion over it, and when David assumed it. It cannot be done, and the law will not assume it. Suppose, again, David and his brothers had died before the old gentleman, would this record establish the right of their heirs to the property as against the old gentleman? We think not, and yet if appellant's contention be true, this record must furnish the evidence upon which they could successfully establish such a claim.

Appellant next contends that, failing to establish David's right to the property under the gift theory, she is entitled to one-half of the property, because of the letter of January 9, 1902, wherein Joseph said that, if David came out, he would divide with him as long as he lived. There are two answers to this contention: (1) a promise to make a gift is not a gift, and (2) the ownership of the property was fixed, not by the letter but by the deeds and the bill of sale; and David's acceptance of the bill of sale and the placing it of record is indicative that both regarded it and not the letter as establishing their rights in the property.

The next contention is that the value of the threshing machine should be fixed at \$1,700, rather than \$2,457.91, as found by the court. The evidence upon which the court based this finding was that the property cost \$3,511.30, and had deteriorated about thirty per cent in the one year's use. This would make the value \$2,457.91, as found by the court. Appellant's contention is based upon the cross-examination of the same witness, in which he said that "a whole lot of harvest machinery would not sell for more than one-half of what you gave for it," and that the price of this machine was about \$3,400. The evidence justified the finding of the court, and the value as so fixed will remain.

Two questions are presented upon respondent's cross-appeal: (1) That he should be awarded the personal property mentioned in the bill of sale, and (2) he should be awarded double damages. As to the first contention, the bill of sale having been delivered and recorded is sufficient to pass the title to the property therein described, and the fact that Joseph Lamar retained the possession during his lifetime does not invalidate it. *Tarbox v. Grant*, 56 N. J. Eq. 199, 39 Atl. 378; *Horn's Exr's v. Gartman*, 1 Fla. 73; *Caines v. Marley*, 10 Tenn. 581, 24 Am. Dec. 515; *Davis v. Garrett*, 91 Tenn. 147, 18 S. W. 113; *Tierney v. Corbett*, 2 Mackey (D. C.) 264; *Walker v. Crews*, 73 Ala. 412.

Respondent's second contention is based upon Rem. & Bal. Code, § 1460:

"If any person, before the granting of letters testamentary or administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall stand chargeable, and be liable to the action of the executor or administrator of the estate, in double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate."

David Lamar came into possession of this property under a claim of ownership. His possession was, therefore, an innocent one, and he could not be held as for an embezzlement. *Beckman v. McKay*, 14 Cal. 251.

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All assignments of error being denied, the judgment is affirmed.

DUNBAR, C. J., MOUNT, and ELLIS, JJ., concur.

[No. 9994. Department Two. March 9, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRY EWING,
Appellant.¹

INDICTMENT AND INFORMATION—VARIANCE — MATERIALITY — IDENTITY OF PERSON ASSAULTED. It is not a material variance to allege an assault against Sylvia R. and to prove an assault against Sylvia E., where the defendant admitted the act and was not misled, in view of Rem. & Bal. Code, § 2061, providing that where the crime involves a private injury, it is sufficient if the information identifies the act with certainty and that an erroneous allegation as to the person injured is immaterial.

SAME—VARIANCE—QUESTION FOR COURT. Upon an information for an assault against Sylvia R., and proof of an assault against Sylvia E., the court may decide, as a matter of law, that there was no material variance, where it was conceded that the true name was as established by the proof, and there was no claim or evidence that the defendant had been misled by the information.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 17, 1911, upon a trial and conviction of second degree assault. Affirmed.

Gill, Hoyt & Frye, for appellant.

John F. Murphy, Hugh M. Caldwell, and Reah M. Whitehead, for respondent.

FULLERTON, J.—The appellant was informed against for the crime of assault in the first degree, the charging part of the information being as follows:

“He said Henry Ewing, in the county of King, state of Washington, on the 11th day of April, 1911, did wilfully, unlawfully and feloniously make an assault upon one Sylvia

¹Reported in 121 Pac. 834.

Russell with a firearm, to wit, with a revolver-pistol then and there loaded with powder and ball, which he, said Henry Ewing, then and there had and held, and did then and there wilfully, unlawfully and feloniously, with said revolver-pistol shoot at, toward and into the body of said Sylvia Russell, with intent then and there wilfully, unlawfully and feloniously to kill said Sylvia Russell."

The appellant entered a plea of not guilty to the information, was tried thereon and found guilty of assault in the second degree. From the sentence pronounced upon him, this appeal is taken. On the trial, at the close of the state's evidence in chief, the defendant moved for the dismissal of the prosecution and for a discharge, on the ground and for the reason that the accused was charged with assaulting and attempting to kill one Sylvia Russell, whereas the state's evidence tended to show that the person assaulted was Sylvia Ewing, the wife of the accused. The motion was overruled, whereupon the court proceeded with the trial, at the conclusion of which he gave, among others, the following instruction:

"The prosecuting witness is designated in the information as Sylvia Russell. Now, it is an admitted fact on this trial that her true legal name is that of Sylvia Ewing, wife of the defendant, and you are instructed that such variance in the description of the prosecuting witness is to be regarded by you as wholly immaterial in this case."

The following instructions were requested by the defendant, and refused by the court:

"I charge you that the defendant is charged with the shooting of one Sylvia Russell; and I charge you that unless the state has proven to you beyond a reasonable doubt as I shall define such a doubt to you, that Sylvia Russell was the name by which she was generally known in the neighborhood where the offense charged was committed, that you should acquit the defendant. . . .

"I charge you that the fact that the person the defendant is charged with shooting might be known by the name of Sylvia Russell only to the inmates of a residence occupied

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only by herself and members of her family who resided with her, would not make her generally known by that name."

The appellant first assigns error on the refusal of the court to grant his motion to dismiss, made at the conclusion of the state's case in chief. He argues that, since he was accused of assaulting Sylvia Russell, and the proofs were that he assaulted Sylvia Ewing, there was a fatal variance between the allegations and the proof entitling him to a discharge.

Formerly, in the prosecution of offenses involving injuries to the person, it was necessary to set forth in the indictment the name of the person injured with strictness, and slight variances, if the names were not *idem sonans*, were held fatal. But the modern rule is to treat the question as one of identity, and if the offense is otherwise described with sufficient certainty to identify the act, to hold the variance immaterial, unless the misnomer actually misleads the defendant. 14 Ency. Plead. & Prac., 286. In this state such is the rule by statute. Section 2061 of Rem. & Bal. Code, is as follows:

"When the crime involves the commission of or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material."

No question was raised at the trial as to the identity of the act set out in the information. Indeed the defendant admitted doing the acts thought to constitute the assault and attempted to justify them; he made no contention that he was misled by the failure to insert the true name of the person assaulted in the information.

The objection to the instruction given by the court is that the court thereby took upon itself to decide a question of fact which was for the jury to decide. But the answer to this is that there was no dispute as to the fact assumed by the court. The state conceded that the legal name of the person assaulted was Sylvia Ewing, and not Sylvia Russell, and the only question that could be raised was, did this fact

mislead the defendant. As to this, as we say, there was no claim in the evidence, and the court properly assumed that the variance was immaterial.

The instructions requested were properly refused for like reasons. To give them would submit an immaterial issue to the jury.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and MOUNT, JJ., concur.

[No. 9872. Department One. March 9, 1912.]

L. H. BREESE, *Respondent*, v. J. F. HUNT, *Appellant*.¹

FRAUD—ACTIONABLE DECEIT—SALE OF CORPORATE STOCK—RESCISION—EVIDENCE—SUFFICIENCY. In an exchange of the corporate stock of one corporation for that of another, fraudulent representations relate to matters of fact which may be relied upon rather than to opinions requiring investigation, and are actionable, where the amount of the personal and real property of the corporation, its profits, dividends, debts and outstanding contracts were misrepresented, nothing was delivered except the shares of stock, and there was no way to ascertain the truth except by inquiry, and statements of officers of the corporation were relied upon.

APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence will not be disturbed on appeal when supported by substantial evidence.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. The admission of immaterial evidence is harmless where it could not have misled the jury.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered June 22, 1911, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed.

Canton & Hensel, for appellant.

W. A. Reneau, G. G. Hannan, and Merritt, Oswald & Merritt, for respondent.

¹Reported in 121 Pac. 853.

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FULLERTON, J.—In the latter part of the year 1910, the respondent owned a majority of the shares of stock of the Breese-Weber Hardware Company, a private corporation, doing a hardware business at Wenatchee. He was also the owner of a house and lot in the same city. The appellant owned a majority of the shares of stock of the Waterville Livery & Stage Company, a corporation, doing a livery and stage business at Waterville. Each of the parties had their respective properties listed for sale with a broker doing business at Wenatchee, and the broker brought the parties together with a view of effecting an exchange of properties. The parties were the active managers of their respective corporations, and took up the negotiations personally, the one pointing out to the other the property and effects of the corporation he represented. The negotiations finally resulted in an exchange and delivery of the properties, the one being taken for the other.

Shortly after the respondent received his shares of stock in the Waterville corporation, he brought the present action for fraud and deceit, alleging in his complaint that the corporation did not own all of the property which the appellant pointed out to him as property of the corporation, and that he had misrepresented its financial condition in other respects. In particular, it was alleged that the appellant stated and represented to the respondent that the corporation owned 45 head of good work horses, mares and geldings, of the value of \$4,500, whereas it actually owned only 40 head of such work horses; that he stated and represented that the corporation owned 340 acres of wheat land, of the value of \$21 per acre, whereas, it actually owned but 280 acres of such land; that he stated and represented that the corporation was free from debt, owing but a trifling amount, less than \$50, whereas it actually owed \$1,153.52; that he stated and represented that the corporation had a contract with the government of the United States for the carrying of the United States mail between Waterville and Bridgeport, which

had then nearly four years to run, and that he had no reason to think the government would cancel or discontinue the contract, whereas he had then been notified by the government that the contract would be discontinued from and after a certain date, and that the government did shortly thereafter discontinue and cancel such contract; that he stated and represented that the corporation was doing a profitable business and had paid a dividend to its stockholders in the previous year of 35 per cent, whereas it had paid no dividend to its stockholders whatever for the previous year; and that he stated and represented that the business was then paying a dividend of 25 per cent to its stockholders, whereas it was then running at an actual loss to its stockholders.

To the complaint, a general demurrer was interposed, and overruled; whereupon the appellant answered to the merits of the complaint, putting in issue the allegations of fraud and deceit. A trial was had thereon before a jury, which resulted in a verdict in favor of the respondent for \$1,516.85, on which judgment was subsequently entered.

The appellant first contends that his demurrer to the complaint should have been sustained for the reason that the misrepresentations alleged to have been made by him are not actionable, being matters the truth or falsity of which the respondent knew or by reasonable diligence on his part could have known. In support of his contention, the appellant cites, *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180, and *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176.

An examination of these cases will show that they are based upon the principle that the alleged false representations either related to mere matters of opinion, or to matters as much within the knowledge of the party claiming to have

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been deceived by them as they were within the knowledge of the party making them. But it is manifest that, in the case at bar, the representations related to matters of fact, and that the respondent did not necessarily have knowledge or means of knowledge of the truth of such matters. It must be remembered that there was no sale and delivery of the corporate property of the corporations. The exchange was of shares of stock, and all that was delivered to the respondent was shares of stock in the corporation represented by the appellant; hence, there was chance for him to repudiate the sale because the property contracted for was not delivered. Since the respondent did not purchase the actual property of the corporation his only means of knowledge of such property was by inquiry from parties who knew. If therefore he inquired of the appellant and the appellant misrepresented the facts and thereby caused him a loss, we can see no reason why he is not responsible for such loss. The case at bar is within the rule of *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811, and *Gilluly v. Hosford*, 45 Wash. 594, 88 Pac. 1027, where it was held that a person dealing with a corporation might rely upon the statements of its officers as to its financial condition and reliability, rather than within the rule of the cases cited. See further: *Curtley v. Security Sav. Society*, 46 Wash. 50, 89 Pac. 180; *Pitman v. Erskine*, 49 Wash. 166, 94 Pac. 921; *Mills v. Knudson*, 54 Wash. 614, 103 Pac. 1123; *Davis v. Lee*, 52 Wash. 330, 100 Pac. 752, 132 Am. St. 973. We think that the misrepresentations are actionable and that the court did not err in overruling the demurrer.

It is next contended that the evidence is insufficient to justify the verdict. But without entering upon its review, we think it ample in this respect. It is true that there was a strenuous conflict as to practically all of the material questions of fact presented, and it may be, as the appellant attempts to demonstrate, that in certain instances the jury took the respondent's version of the matter where the weight

of the evidence appears to be with the appellant. But these are not questions for the consideration of this court. We find there was substantial evidence supporting the verdict, and this ends the inquiry.

It is next assigned that the court erred in the admission of evidence. The respondent, while on the witness stand, was asked concerning the appellant's statements with reference to the book accounts due the Waterville corporation; and over the appellant's objection to the effect that there was no controversy over the book accounts, was allowed to answer that the appellant said, "they amounted in the neighborhood of \$2,000; that he could not tell exactly without going over the books." After reading the record, it is hard to see the materiality of this inquiry, but we are clear, nevertheless, that it was not prejudicial. It gave the jury no misinformation, and they could not have been misled by the answer in any way. Error without prejudice is not a cause for reversal.

Exceptions were taken to certain of the instructions given by the court to the jury, but we find the instructions applicable to the questions before the jury, and to be without error.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

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[No. 9871. Department Two. March 9, 1912.]

ROBERT JOHNS, *Appellant*, v. OZIAS P. JAYCOX *et al.*,
Respondents.¹

PRINCIPAL AND AGENT—SALES AGENT—AUTHORITY—SALES—WARRANTY BY AGENT. A sales agent of talking machines has no implied authority to guarantee an average number of sales of records for each machine sold, under the rule that there is no implied authority to give a warranty where the warranty is beyond the usage of the business; especially where he carried a printed form of contract without apparent authority to modify it, and which should have put the buyer on inquiry; evidence of a prevailing custom being necessary to sustain such an extraordinary guaranty.

SALES—WARRANTY—WAIVER. Where the seller repudiated a guaranty made by his sales agent, and requested a telegram in case the buyer desired the balance of the goods shipped without the guaranty, a telegram directing shipment of the balance as ordered is an acquiescence in the seller's claim, and waives the guaranty, and the buyer cannot thereafter claim that, the guaranty having induced the contract, there could be no contract if the guaranty was void.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered March 14, 1911, upon findings in favor of the defendants, in an action on contract, after a trial on the merits to the court. Reversed.

W. B. Mitton and Brooks & Bartlett, for appellant.

T. P. & C. C. Gose, for respondents.

ELLIS, J.—Action to recover a balance due upon a written contract for two hundred talking machines, sold by the plaintiff to the defendants, through an agent. The material facts are nearly all admitted. The machines were purchased to give away to defendants' customers as an advertisement. When first approached, the defendants declined to make the purchase. The agent then proposed that, if the defendants would execute the printed form of contract

¹Reported in 121 Pac. 854.

which he produced, he would give them a written guaranty that the defendants would sell an average of twenty-five records to each customer to whom a machine was given. Thereupon the defendants, and the plaintiff by his agent, executed in duplicate and mutually delivered the printed contract for the purchase of 200 machines, with nine seven-inch records each, at a price of \$8.20 for each machine and its nine records. In the contract, the plaintiff agreed to furnish to defendants any number of seven-inch disc records at thirty cents each, net, with the understanding that they would be retailed by defendants at fifty cents each, or given away without charge. The agent then executed in the name of the plaintiff and delivered to the defendants the following guaranty:

"Part of contract attached between Standard Talking Machine Co. and O. P. Jaycox & Co. All machines and records not sold or given away four months from receipt of goods and returned in good condition freight paid to Chicago, Ill. Cost price of each machine and records will be refunded to O. P. Jaycox & Co. Guarantee sale of 25 records on average to each machine given away four months from date customer has received machine.

"Standard Talking Machine Co.

"Signed F. P. Howard, Salesman."

The memorandum delivered to the defendants was a carbon duplicate, but it was claimed by the plaintiff that the agent did not send to him the original nor any copy thereof but only the plaintiff's duplicate of the printed contract. There being no evidence to the contrary, we must assume this as a fact. There was evidence that one of the defendants, Bridges, before payment for the first shipment of machines had been made, called upon the plaintiff's manager in Chicago, and was there informed that the plaintiff would not guarantee sales of records, that the agent had no authority to do so, that no more goods would be shipped until there was a definite understanding, and that an understanding was then reached that the plaintiff would not be held to guarantee the

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sales of records. The defendant Bridges claimed that he had no memory of such an agreement. It is unquestioned, however, that after a part of the machines and records were delivered and a further installment was ordered, the plaintiff, being then informed of the memorandum, wrote to the defendants that he would not guarantee the sales of the records, that the agent had no such authority, that the order would be held up awaiting reply, "and if satisfactory to you you can wire us upon receipt of this communication and we will make prompt shipment of the order." The defendants replied by wire, "Ship fifty machines and records as ordered at once." At that time the defendants were compelled to have the remaining number of the machines to supply to customers to whom tickets had already been issued. The remaining machines and records were then furnished. A part of the agreed purchase price remaining unpaid, action was commenced for its recovery. The defendants interposed a counterclaim for loss of profits upon sales of records which should have been made to meet the guaranty contained in the memorandum.

The cause was tried to the court without a jury. The court found that the guaranty was a part of the contract; that defendants' loss of profits was \$400; that there remained unpaid of the purchase price \$410. Judgment was rendered in favor of the plaintiff for \$10 and costs. The plaintiff has appealed.

The appellant contends that the memorandum of guaranty was never a part of the contract, because the agent had no authority to make it; that, when he appeared with a printed form of contract, he was without apparent authority to modify it, and the respondents were not warranted in believing that he had authority to make the memorandum of guaranty or warranty. While an agent's authority can hardly be limited by the form of blanks he carries, that circumstance and the nature of the business should put a purchaser on inquiry. The apparent scope of his authority was that of a

sales agent, and it is upon the powers implied by that relation that any sound decision of this case must rest. There is much seeming confusion in the adjudicated cases upon this question. There are decisions which hold that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears. *Talmage v. Bierhauser*, 103 Ind. 270, 2 N. E. 716; *Woodford v. McClenahan*, 9 Ill. 85; *Alpha Mills v. Watertown Engine Co.*, 116 N. C. 797, 21 S. E. 917; *Dennis v. Ashley's Admr's*, 15 Mo. 315; *Milburn v. Belloni*, 34 Barb. 607; *Manley v. Ackler*, 76 Hun 546; *Schuchardt v. Allens*, 1 Wall. 359.

But an examination of those cases shows that, while announcing a very broad rule, they in reality, when applied to the given facts, go only to the extent that the implied power of warranty by the agent upon which a purchaser may rely extends to those things necessary to consummate the contract and usually incident thereto and relating to the title, quality or condition of the thing sold. In none of them was the rule actually applied as authorizing warranties so extraordinary as that here presented. A careful consideration of the authorities cited in the briefs, as well as an independent search, leads us to the conclusion that the rule laid down in 31 Cyc. as the one supported by the more numerous and more recent decisions is also the one in consonance with the better reason. It is as follows:

"The rule which is supported by the more numerous and more recent decisions is that if in the sale of that kind or class of goods which the agent is empowered to sell it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority; and that if an agent with express authority to sell has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty. . . . The implied power of an agent to warrant title and quality rests upon the necessity and propriety of such warranties in the sale of goods. It is not therefore to be extended to other warranties of an extraordinary sort, however impossible the agent may find it

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to make a sale without giving such warranties." 31 Cyc. 1353, 1355, 1356.

The correct principle, briefly stated, is that an agent under general employment to make sales is impliedly authorized to employ only those means for the purpose usual to the business, and that the purchaser cannot safely assume that he has authority to make any extraordinary guaranty or warranty, or one beyond the usage of the business in which the agent is employed. *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Wait v. Borne*, 123 N. Y. 592, 25 N. E. 1053; *Bierman v. City Mills Co.*, 10 Misc. Rep. 140, 30 N. Y. Supp. 929; *Hayner & Co. v. Churchill*, 29 Mo. App. 676; *Palmer v. Hatch*, 46 Mo. 585; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Waupaca Elec. Light & R. Co. v. Milwaukee Elec. R. & Light Co.*, 112 Wis. 469, 88 N. W. 308; *Troy Grocery Co. v. Potter & Wrightington*, 139 Ala. 359, 36 South. 12; *Anderson v. Bruner*, 112 Mass. 14.

The rule thus stated appeals to us as the one best calculated to preserve that just balance which the law is intended to maintain between a reasonable protection of the principal from the unauthorized acts of his agent, and a reasonable protection of the purchaser from an unwarranted repudiation by the principal of the acts of the agent. We have been cited to no authority, and a careful search has revealed none, in which it has ever been held that an agent employed to make sales at wholesale has an implied authority not only to warrant the quality of the thing sold but also to guarantee that the purchaser will make sales thereof at retail in any particular amount or at any given profit. A more extraordinary guaranty can hardly be imagined. We can conceive of no sound principle upon which such a holding could rest. There was no evidence of any prevailing custom in the business of selling talking machines which would warrant an assumption on the purchaser's part that the guaranty was authorized. The extraordinary nature of the guaranty made proof of such custom essential to a recovery upon the guar-

anty in the absence of any showing of an express authority. So far as disclosed, there was no such custom. As has been said in a similar case:

“Usages of trade are not recognizable, unless they have the essential elements of certainty, notoriety, and continuity, bringing themselves home to the knowledge of those who are concerned in the trade or business to which they may pertain. The courts adhere strictly to this principle, as essential to a fair administration of justice. If it were departed from, uncertainty, insecurity in the transaction of business, and injustice would result. Parties could not know what were their rights or duties, if they were to be determined by loose evidence of some merely local, indefinite and partial usage.” *Herring, Farrell & Sherman v. Skaggs*, 73 Ala. 446, 454.

See, also, *Upton v. Suffolk County Mills*, *supra*.

The respondents argue that, since the guaranty induced the contract, there was no contract if the guaranty be held void. It is manifest that, since the respondents had no right to rely upon the guaranty made by the agent, they cannot be heard to say that they did so rely. In the absence of a ratification by the appellant, they can base no rights either of an attack or defense upon the guaranty. There is no question that, if a principal elect to ratify a contract which the agent was not authorized to make, he must ratify the whole of it. If he ratifies the contract, he ratifies the warranties. But in this case there was no such ratification. The record shows that the appellant pointedly repudiated the guaranty as soon as he learned of it, and refused to further proceed with the contract if the guaranty was insisted upon. The evidence shows an acquiescence by the respondents in that repudiation. They accepted the performance of the contract without an affirmance of the guaranty. When the appellant wrote them to the effect that no further shipment would be made so long as the guaranty was claimed, the respondents answered authorizing the shipment as requested by the letter, thus plainly waiving the guaranty and affirm-

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ing the contract without it. It can make no difference that they then had made arrangements to give away the whole number of machines. That arrangement had been made by them, not in reliance upon any act of the appellant indicating a ratification of the guaranty, but in sole reliance upon the guaranty of the agent which, as we have seen, was of so extraordinary a character that they had no right to assume his authority to make it. To hold, as contended by counsel, that the appellant, without knowledge or ratification, should be estopped to question the guaranty because the respondents had placed themselves in a position where they must have the machines in reliance upon the guaranty, would be to hold that the principal would be bound in almost every instance by the unauthorized acts of the agent however palpably beyond the scope of his employment. It would be, in effect, to say that, though in law the purchaser had no right to rely upon a guaranty on its face beyond the scope of the agent's employment, yet if he does so rely to his injury the principal will be bound. The paradox is too plain to require further comment.

The court was in error in sustaining the counterclaim. The finding that there was a balance of \$410 due upon the purchase price of the machines was not excepted to by either party. The cause is therefore remanded with direction to modify the judgment in favor of the plaintiff, making it for the sum of \$410 and costs.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9393. Department Two. March 11, 1912.]

P. H. HILLMAN, *Plaintiff*, v. CHARLES W. DONALDSON *et al.*,
Respondents, LEWIS LEVY *et al.*, *Appellants*.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, will not be disturbed on appeal if sustained by sufficient evidence, where the trial judge heard and saw the witnesses.

MECHANICS' LIENS—NOTICE—EXCESSIVE CLAIM—WAIVER. An inadvertent and excusable mistake making an erroneous charge in a mechanics' lien notice will not defeat the lien, where at the commencement of the trial it was conceded and all excess waived.

CONTRACTS—BUILDING CONTRACTS—PERFORMANCE OR BREACH—CERTIFICATE OF ARCHITECT. An architect's certificate as to damages by reason of demurrage and extras is not conclusive where there was sufficient evidence to show that it was arbitrary and unreasonable.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 11, 1910, upon findings favorable to part of the defendants, in an action to foreclose mechanics' liens, after a trial to the court. Affirmed.

Fouts & Gould (*Richard Winsor*, of counsel), for appellants.

John P. Hartman, for respondents Donaldson *et al.*

Elias A. Wright, for respondent Duggan.

CROW, J.—On January 14, 1909, the defendants Lewis Levy and Rachel Levy, his wife, entered into a written contract with their codefendants, C. W. Donaldson and D. J. Noonan, for the erection of a three-story apartment building, in the city of Seattle, upon lots belonging to Levy and wife, for the contract price of \$25,600. On September 19, 1909, the plaintiff, P. H. Hillman, commenced this action against the defendants C. W. Donaldson, Lewis Levy, Rachel Levy, his wife, and others, to foreclose a labor lien on the premises. On October 9, 1909, James Duggan filed his com-

¹Reported in 121 Pac. 866.

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plaint in intervention to foreclose his lien for \$961.38, for labor performed and materials furnished. Thereafter, upon motion of Levy and wife, the Empire State Surety Company, a corporation, was made a party defendant and served with process for the reason that it had executed a bond to Levy and wife in the sum of \$10,000, to secure the faithful performance of the contract by Donaldson and Noonan. Other parties to the action need not be mentioned on this appeal.

The pleadings are voluminous. Levy and wife alleged, that Donaldson and Noonan had not performed their contract in accordance with the plans and specifications; that, after giving proper notice to the contractors and the surety company, they had completed the building; that their damages had been certified by the architect as in the contract provided; that they had been damaged in the sum of \$4,852.12, for expenses incurred in completing the building, in the sum of \$3,800 for demurrage arising from delay, in the sum of \$675 for demurrage paid to the architect, in the sum of \$6,719 for faulty construction, and in the sum of \$2,602.50 for liens filed by laborers and subcontractors, for all of which they demanded judgment, together with \$500 attorney's fees alleged to have been expended in defending foreclosure actions on the liens.

In an oral opinion, the trial judge announced his findings and conclusions to the effect, that none of the lien claimants, other than the intervener Duggan, was entitled to a foreclosure decree; that Duggan was entitled to judgment for \$653.38, \$75 attorney's fees, his costs, and a decree of foreclosure; that the defendants Levy and wife had paid the contractors \$27,121.94, and were entitled to demurrage and damages in the sum of \$2,574.83, making a total credit to them of \$29,696.77; that the defendant Donaldson, as successor of Donaldson & Noonan, had received \$26,930; that he was further entitled to \$1,838 for extras, being a total credit to him of \$28,768, leaving a balance of \$928.77 in favor of the defendants Levy and wife, which they were en-

titled to recover from the contractors and surety company; and that they would also be entitled to recover from Donaldson and Noonan and the surety company the sums found due the intervener Duggan, should they be compelled to pay the same. A final decree was entered in accordance with these findings, from which the defendants Levy and wife have appealed.

The appellants are dissatisfied with the judgment, insisting the award is insufficient, and further insisting that the intervener and respondent Duggan is not entitled to a foreclosure of his lien. As to Duggan, it is contended that his asserted lien is invalid; that his notice was not filed within the statutory time; that, as to certain materials which appellants claim he delivered after June 9, 1909, he failed to mail or deliver to appellants a duplicate statement, as required by chapter 45, Laws 1909, page 71 (Rem. & Bal. Code, § 1133), and that in his lien notice he fraudulently claimed nine dollars per yard for concrete work, knowing his contract called for seven dollars per yard. These contentions involve disputed questions of fact upon which the evidence is conflicting. It is, however, sufficient to sustain findings, that the lien notice was filed in time; that all material for which any lien has been allowed was delivered upon the premises prior to June 9, 1909; that the erroneous charge for concrete work was not a fraudulent or intentional act of the respondent Duggan; that it was an inadvertent and excusable mistake; that respondent was dangerously ill and not expected to live when he verified the notice; and that he could not at that time correctly advise his counsel as to the exact facts. At the commencement of the trial, the respondent Duggan voluntarily conceded his mistake, called the court's attention thereto, and waived all claims in excess of seven dollars per yard. The findings, conclusions and decrees of the trial court sustaining and foreclosing the Duggan lien are affirmed.

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Appellants further contend that they have not been awarded all damages they have sustained by reason of the failure of Donaldson and Noonan to complete the building in accordance with their contract, and in compliance with the plans and specifications prepared by the architect. This contention involves questions of fact. We have carefully examined the entire record, which is voluminous, containing about 900 pages of typewritten evidence and numerous exhibits. To discuss this evidence in an opinion of reasonable length is impossible. It is in hopeless conflict. Appellants rely on the terms of their contract and the certificate prepared by their architect, stating the damages they have sustained, and upon a claim for demurrage of \$20 per day for delay in completing the building, and further claims for damages resulting from improper and defective work. On the other hand, the respondents Donaldson and Noonan contend that the building was actually completed by them (subject only to changes ordered by appellants and their architect) in strict accordance with the plans and specifications; that the defects, if any, in the construction of the building were caused by improper specifications; that the certificate of the architect was arbitrary and worthless; that they did a large amount of extra work upon the order of appellants and their architect; that the architect arbitrarily and without reason refused to give them certificates for the work done, and that a balance of \$3,266.24 was due them for which in their cross-complaint they demanded judgment. The trial judge heard the evidence, made his computations, saw the witnesses, heard them testify, passed upon their credibility and upon the conflicting evidence thus presented, announced his findings and entered the decree from which this appeal has been taken. After a most diligent and careful examination of the entire record, we are not convinced that his findings, conclusions, or decree should be disturbed.

Some exceptions are taken to rulings on the admissibility of

evidence offered by appellants, but we find no error in that regard. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and ELLIS, JJ., concur.

[No. 9758. Department One. March 11, 1912.]

PACIFIC AVIATION COMPANY, *Appellant*, v. RALPH L.
PHILBRICK *et al.*, *Respondents*.¹

SALES—ACTION FOR PRICE—WARRANTY—EVIDENCE—SUFFICIENCY. There is no sufficient evidence of a warranty to the defendants by the seller of an aeroplane that it was in good condition and that one W. was an experienced aviator and capable of making flights with the machine at the city of H., where it appears that the machine was sold direct to W. by a bill of sale warranting title only, that defendants assisted W. to purchase the machine by giving the promissory note in suit to W., after the seller of the machine had informed defendants that flights could not be made at the city of H. on account of the unsuitability of the grounds, and defendants relied on the oral representations of W. that he could make the flights.

EVIDENCE—TO VARY WRITING—BILL OF SALE—ORAL WARRANTY. Where a bill of sale warrants only the title, evidence of an oral warranty of the good condition of the machine is inadmissible, as varying the terms of the writing.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 8, 1911, upon findings in favor of the defendants, in an action upon a promissory note. Reversed.

T. H. McKay and *Arthur I. Moulton*, for appellant.

James P. H. Callahan, for respondents.

Gose, J.—This is a suit upon a promissory note. There was a judgment for the defendants for their costs. The plaintiff has appealed.

The respondents admit the execution and delivery of the note, and affirmatively allege, in substance and effect, that,

¹Reported in 121 Pac. 864.

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on or about July 1, 1910, the appellant owned a Curtiss bi-plane and engine; that the respondents, being then desirous of giving certain exhibitions of aeroplane flights at Hoquiam, entered into negotiations with the appellant; that the note represents a part of the consideration for the bi-plane and engine; that the appellant, for the purpose of inducing the respondents to expend \$1,000 in the purchase of the bi-plane and engine, "falsely and fraudulently . . . represented and warranted" to the respondents that they were in good condition and capable of making successful flights; that one Waldron was an experienced aviator and had made two flights in the aeroplane; that, acting upon "such false and fraudulent representations and warranties and believing the same true," the respondents were induced to pay the appellant \$500 in money, and to execute the note in suit; that the bi-plane and engine were not in good condition and were not capable of making successful flights; that Waldron was not an experienced aviator, and had never made flights in that or any other "aeroplane," as the appellant well knew; and that, by reason of "such false and fraudulent representations and warranties," the respondents were induced to expend large sums of money in the purchase of the bi-plane and engine and in carrying them from Portland, Oregon, to Hoquiam, Washington, where the flights were to be made; "by reason whereof, the defendants have been damaged to the amount of \$750." The respondents prayed a judgment for that amount. The appellant joined issue upon the new matter in the answer.

The court found the facts substantially as alleged in the answer; and further found, that the bi-plane and engine have not been delivered or tendered to the appellant; that on July 10, the respondents took from Waldron a chattel mortgage on the bi-plane and engine, to secure them on account of the \$500 advanced by them to Waldron, and to secure the payment of the note in question; that the respondent E. A. Philbrick is a lawyer, and represented the respondents in all

the transactions with the appellant, and that he drew the note, bill of sale, and chattel mortgage referred to in the record. It will be observed that there is no direct allegation of a sale of the machine to either respondents or Waldron, and the court made no finding as to who was the purchaser except in a memorandum opinion filed prior to the filing of the findings, where he expressly stated that he found that the sale was made to respondents.

The answer appears to have been drawn upon the theory of the breach of an oral warranty, but the respondents now insist that their defense to the action is predicated upon the fraud of the appellant. The history of the transaction is this: The respondents were a committee chosen by the citizens of Hoquiam to arrange for an aeronautic exhibition as a part of the entertainment to be given on the Fourth of July, 1910. As such committee, they entered into negotiations with the appellant for an aeroplane flight on that day, and a representative of the appellant went from Portland to Hoquiam to view the ground and complete the arrangements. Upon his return to Portland, the appellant on June 30, wired the respondents as follows: "You misrepresented your grounds. You stated you had half mile straight. Our aviator refuses to fly on 600 feet. Therefore the deal is off." Upon the receipt of this message, the respondents E. A. Philbrick and Hamburg went to Portland, on June 30, for the purpose of requiring the appellant to make the flight, insisting that its representative had definitely agreed to do so and had thereby caused them to advertise the fact that the flight would take place. The appellant refused to accede to their demand, and the bi-plane and engine were purchased on the following morning and shipped to Hoquiam. The purchase price was \$1,500. The respondents paid \$500 in money, gave their note for a like sum, and Waldron seems to have been given a credit for the remaining \$500. The note was drawn in favor of Waldron, and by him forthwith indorsed to the appellant. The items purchased were con-

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veyed by the appellant direct to Waldron by a bill of sale drawn by the respondent E. A. Philbrick. The testimony of the respondents who conducted the negotiations with the appellant clearly show that Waldron was the purchaser. The respondent E. A. Philbrick testified that he said to the appellant: "Any deal you make with Waldron as to the ownership of the machine, that is between you two fellows." And again: "I spoke up and said, this machine I understand is going to go to Waldron;" and in response to the question: "The machine was sold to Waldron, wasn't it?" he answered: "Yes, sir." The respondent Hamberg was asked: "You said you would not buy it at all?" and answered: "Yes, sir; we said we would not buy it." The attitude of the respondents in their brief makes this explanation necessary, as they seem to contend that the evidence justified the statement in the memorandum opinion. The bill of sale and chattel mortgage, together with the oral testimony, make it clear that the sale was made to Waldron, and that it was so understood and intended by all the parties to the transaction.

This brings us to the material question, viz., the alleged oral warranty and fraudulent representations. It would seem that, when the respondent Philbrick, a lawyer, was insisting that the appellant had violated its contract and was demanding performance, he would not have depended upon oral representations of the appellant's officers in making a second contract. Moreover, we think the testimony of the respondents tends to support the writings. In this connection, reference is again made to the telegram. The respondents testified that the appellant's officers represented that Waldron was an experienced aviator and had made two flights in the machine. On the other hand, these officers testified that they made no such representations, but that they only stated that he had made balloon ascensions. The respondent E. A. Philbrick testified that he had a conversation with Waldron, in which he said to the latter: "I told him Mr. Manning, the

appellant's president, said he, Waldron, was anxious to be the owner of a flying machine, . . . and I asked him if he had any experience and he said 'Oh, yes; I have been up a couple of times.' I don't remember whether he told what machine he was in or not. I remember of satisfying myself that he knew what he was talking about." Again, the witness said: "I asked him if he was an experienced aviator, and he said, 'Yes,' and that satisfied me." The respondent Hamberg testified: "I says, 'Mr. Waldron, now you have flown the machine, have you?' and he says: 'Yes, I have.' And I said: 'No monkey business down here. We must have a machine that can fly,' and I says, 'Are you certain you can make it go or can go up in the machine?' and he said, 'Yes, sir; everything will be all right.'" Respondent E. A. Philbrick was asked if Mr. Manning, the appellant's president, did not say to him that its representative who had viewed the ground had reported that it "was impossible to fly on any of the grounds in or around Hoquiam, and that it was unsafe to attempt a flight there;" and answered: "Yes, sir; Mr. Manning said something in that regard." He was then asked: "Didn't he say that in terms?" and answered: "Well, that was the effect of it, I remember." He was then asked whether the conversation in reference to the sale of the machine was had subsequent to the making of these statements, and answered: "Yes, I think so." The respondent Hamberg was asked: "Mr. Manning had told you that his son said he could not fly it there?" and answered, "Yes, sir." On July 5, the respondent E. A. Philbrick wrote the appellant as follows: "As you may know, our machine did not get into the air either of the days scheduled, but the fellows expect to be able to get it rigged up some way (I don't know a blessed thing about machines, so can't tell what they expect to do), and make some flights later on. I thought best to let you know, as I stated that I would probably be down to take up the note before the 10th, the day it is due; but under the circumstances shall wait and see if we cannot get in some cash

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from flights, and will unless present plans miscarry and something intervenes to prevent my coming down Saturday evening and square up with you." This testimony established two things, (1) that the respondents were informed that flights could not be made at Hoquiam, owing to the unsuitability of the grounds, and (2) that the respondents relied upon Waldron's representations that he had made flights in the machine and that he could fly it at Hoquiam. The respondents had advertised that a flight would be made as a part of the program for the celebration of the national holiday, and were, of course, determined, if possible, to keep faith with the people. To accomplish this purpose, it is apparent that they were willing to accept the representations of Waldron that he could make the flight with the machine. In furtherance of this object, they assisted him in making the purchase. He failed to make good his representations.

Touching the question of a parol warranty, it suffices to say that the bill of sale to Waldron warrants title only. The instrument is complete in itself, and evidence of a prior or contemporaneous parol warranty was inadmissible. *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11; *Buffalo Pitts Co. v. Shriner*, 41 Wash. 146, 82 Pac. 1016; *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332; *Seitz v. Brewer's Refrigerating Mach. Co.*, 141 U. S. 510.

The judgment is reversed, with directions to enter a judgment for the appellant as prayed for in the complaint.

DUNBAR, C. J., CHADWICK, PARKER, and CROW, JJ., concur.

[No. 10020. Department One. March 11, 1912.]

CROWE & COMPANY, *Plaintiff*, v. ADKINSON CONSTRUCTION
COMPANY *et al.*, *Appellants*, FRYER & COMPANY
Respondent, G. CONNELL *et al.*, *Defendants*.¹

EXECUTORS AND ADMINISTRATORS—ACTIONS — CLAIMS — PRESENTATION—MECHANICS' LIENS—FORECLOSURE. Under Rem. & Bal. Code, § 1479, providing that no holder of any claim against an estate shall maintain an action thereon unless he shall have first presented a claim to the executor or administrator, the presentation of a claim is a condition precedent to an action to foreclose a mechanics' lien against property of the estate, for materials furnished to a contractor under a contract made with the deceased during his lifetime.

SAME — MECHANICS' LIENS — MATERIALS. The necessity of presenting a claim is not affected by the fact that there is no privity between the materialman and the owner, the lien not depending on contract and being limited to the reasonable value of the services.

HUSBAND AND WIFE — COMMUNITY PROPERTY — ADMINISTRATION. Upon the death of either spouse, the entire community estate, and not the deceased's portion, is subject to probate.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 2, 1911, upon findings favorable to part of the defendants, in an action to foreclose mechanics' liens, after a trial to the court. Reversed in part and affirmed in part.

James B. Howe, for appellants.

Shepard & Burkheimer, for respondent.

Gose, J.—D. E. Fryer & Company, by its cross-complaint, is asking to foreclose two liens; one for material furnished and used in the construction of a building, and the other for material furnished and used therein and for labor performed in its construction. From a decree establishing and foreclosing these liens, the defendants Adkinson Construction Com-

¹Reported in 121 Pac. 841.

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pany, Clara Graves, widow of E. O. Graves, Edward B. Graves, Jessie Graves, and Evelyn Kyer, executors of the will of E. O. Graves, and as his heirs and devisees, have appealed. The plaintiff and the remaining defendants have no interest in this appeal.

The pertinent facts are as follows: Edward O. Graves in his lifetime entered into a contract with the appellant Adkinson Construction Company, whereby the latter agreed to erect a building upon a certain parcel of land then owned by the former. Edward O. Graves thereafter, and on February 9, 1909, died leaving surviving him Clara Graves, his widow, Edward B. Graves, Jessie Graves, and Evelyn Kyer, who are his executrixes, executor, heirs and devisees. Thereafter and between March 18 and June 10, 1909, D. E. Fryer & Company, the sole respondent, at the request of the contractor, furnished certain material for the building and performed certain labor in its construction. Upon the failure of the contractor to pay therefor, the respondent in due time filed its liens and commenced foreclosure. The record does not disclose whether the contractor commenced construction before or after the death of the testator. There is no allegation in the complaint that the lien claims were presented for allowance or rejection, nor is there any evidence of that fact in the record. Before the introduction of any testimony, the executrixes and the executor, hereafter called the appellants, objected to the presentation of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action; and at the close of the respondent's evidence, they asked for a decree in their favor because of the failure of the respondent to allege a presentation of its claim.

The appellants contend that it was incumbent upon the respondent to allege and prove the presentation of its claim to the appellants, and that its failure to do so defeats its right to a lien upon the property. We think this view is a correct

interpretation of our statute. Rem. & Bal. Code, § 1479, provides:

“No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator.”

In *Casey v. Ault*, 4 Wash. 167, 29 Pac. 1048, it was held that an action to foreclose a laborer's lien claimed upon certain sawlogs owned by an estate could not be maintained where the claim therefor had not been presented to the executor. In *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480, it was held that contingent claims must be presented to the executor or administrator for allowance or rejection before a suit could be maintained thereon. It was also said that the word “claim,” “in its ordinary use, has a broad meaning and has been construed as synonymous with cause of action.” The court further said, speaking of reading the several sections of the statute together for the purpose of ascertaining their true meaning:

“And if we are to give effect to all these provisions of the statute, and the general rules of statutory construction applicable thereto, it is obvious that the word ‘claim’ must have a uniform sense throughout the statute and be held to include every species of liability which the executor or administrator can be called on to pay, or to provide for the payment of, out of the general fund belonging to the estate.”

We have further held that the claim of a judgment creditor must be presented to the personal representative of a deceased person. *Meikle v. Cloquet*, 44 Wash. 513, 87 Pac. 841; *Doyle v. McLeod*, 4 Wash. 732, 31 Pac. 96. Such, we think, is the plain meaning of the statute.

Morse v. Steele, 140 Cal. 303, 86 Pac. 693, is both instructive and pertinent. That was an action for damages for the breach of a contract made between the plaintiff and the testator in his lifetime. The contract was to run for four years. About two years after the execution of the contract, the testator died, and the defendant had become

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executrix under his will. The complaint alleged performance upon the part of the plaintiff and that the testator in his lifetime, and afterwards the defendant as his executrix, failed to take care of the animals which were the subject-matter of the contract. The complaint did not allege a presentation of the claim, and this omission was held fatal to a recovery, under a statute substantially the same as our statute. We think the correct rule of construction is stated in Schouler's work on Executors and Administrators (2d ed.), § 419. It is as follows:

"The claims and demands, whose suit or presentation within the statute period are thus contemplated, appear in general to be, all claims that could be asserted against the estate in a court of law or equity, existing at the time of the death of the deceased, or coming into existence at any time after his death, and before the expiration of the statute period, including claims running to certain maturity, although not yet payable. . . ."

See, also, *Whitmire v. Powell* (Tex. Civ. App.), 117 S. W. 433.

The respondent relies largely upon the case of *Coburn, Admr. v. Harris*, 58 Md. 87. In that case the claim arose out of a contract for the sale of stone to the intestate in his lifetime, the stone being delivered after his death to the administrators of his estate. The point decided was that the statute providing that actions upon rejected claims shall be brought within nine months after the presentation and rejection of the claim, had no application to the facts. The court, after observing that the claim was "without doubt a claim against the estate of the decedent," said: "Whether such claim as this must be presented within any particular time or be barred, is not now before us."

We are unanimous upon the point that there can be no enforcement of an involuntary lien against the estate of a deceased person arising out of an executory contract entered into with the deceased in his lifetime, whether the contract has been performed wholly or in part after his death, where

the claim has not been presented to his executor or administrator. To state the matter in another form, the presentation of the claim of lien to the executor or administrator of the estate for allowance or rejection must, in such cases, be both alleged and proven, or the lien cannot be allowed. This view is in harmony both with the statute and with the principles announced in our own decisions and those in other jurisdictions. The presentation of the claim is not only in aid of orderly procedure in the probate of the estate, but it enables the executor or administrator to investigate the claim and to allow it if deemed meritorious, without being vexed with expensive litigation and delay in the settlement of the estate. We are not here concerned with a claim arising out of a contract, express or implied, with the personal representatives of the deceased.

The respondent argues that, because there is no privity of contract between the materialmen and the owner in such cases, and because the law makes the original contractor the agent of the owner, there is no necessity of presenting the claim. The argument overlooks the purpose of the statute and overlooks the fact that the respondent's contract with the contractor is not binding upon the owner of the property, but that the amount of its lien is, as between it and the owner, limited to the reasonable value of the material delivered and service rendered. Otherwise the property could be sacrificed at the behest of an impecunious, improvident, or dishonest contractor. *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108.

The respondent further contends that the lien is enforceable against the undivided one-half of the property owned by the widow. This view is not sound. Upon the death of either the husband or the wife, the entire estate, and not the portion owned by the deceased, is subject to probate.

The judgment is reversed with directions to dismiss the action, as against the Graves individually and collectively,

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and against the Graves estate; and affirmed as to the Adkinson Construction Company, it having filed no brief.

DUNBAR, C. J., CHADWICK, PARKER, and CROW, JJ., concur.

[No. 10028. Department One. March 11, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. H. A. ROBINSON,
Respondent.¹

INTOXICATING LIQUORS — LOCAL OPTION LAW — APPLICATION — WHOLESALE DEALERS — STATUTES — CONSTRUCTION. The local option law of 1909 (Rem. & Bal. Code, § 6292 *et seq.*) prohibits sales of intoxicating liquors by wholesalers in dry units, notwithstanding the proviso that wholesalers may deliver unbroken packages at residences in dry units; in view of the restrictions against all sales in any quantity whatsoever in dry units or the taking or soliciting of orders therein, and the often repeated use of the term "sale" whenever and wherever it was intended to permit a sale in a dry unit, which do not include sales by wholesalers, and also the safeguarding of sales by druggists in dry territory, and the general purpose and spirit of the act, all of which require that the proviso be strictly construed to conform to the language of the general provisions; consequently "sales" by wholesalers, whether located within or without the dry unit, must be made outside of the district.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 27, 1911, dismissing a prosecution for violation of the local option law, upon sustaining a demurrer to the information. Reversed.

Augustus Brawley, for appellant.

M. P. Hurd, for respondent.

GOSE, J.—The state prosecutes this appeal from a judgment sustaining a demurrer to the information. The charging part of the information is as follows:

"That in Skagit county, state of Washington, and on or about the 26th day of October, A. D. 1911, the said defendant, H. A. Robinson, under and by virtue of a wholesale

¹Reported in 121 Pac. 848.

liquor license issued by the United States government, did unlawfully sell, at the place of business for which said wholesale license was issued, one gallon of intoxicating liquor, to wit, whiskey; to one Charles Colvin, the said defendant H. A. Robinson delivering the said intoxicating liquor at the residence of said Charles Colvin, such place of sale and such place of delivery being within the corporate limits of the city of Mount Vernon, Skagit county, Washington, a city of the third class, and the said city of Mount Vernon being a unit wherein the sale of intoxicating liquor was then and there prohibited, and such sale of intoxicating liquor then and there being prohibited and unlawful, . . ."

The demurrer was sustained upon the ground that the information does not state facts sufficient to constitute a crime or misdemeanor. The appeal presents the question of the interpretation of the local option statute, as applied to a wholesale liquor dealer having a place of business within a dry unit. Laws 1909, page 153 (Rem. & Bal. Code, § 6292 *et seq.*). A correct understanding of the case requires a somewhat extended reference to the statute. The act is entitled:

"An act to provide for the submission to the qualified electors of the question whether the sale of intoxicating liquors shall be licensed or prohibited, providing for the enforcement of the result of the elections hereunder, defining offenses hereunder, and providing penalties therefor."

The applicable parts of the statute are as follows:

"Section 1. For the purpose of an election upon the question of whether the sale of intoxicating liquors shall be permitted as hereinafter provided for, there shall be the following units of territory, . . ."

"Section 2. Within any unit hereinbefore created, a special election may be held upon the question of whether the sale of intoxicating liquor shall be permitted within that unit, . . ."

"Section 3. Any unit hereby created may hold a special election upon the question of whether the sale of intoxicating liquor shall be permitted within the boundaries of such unit, . . ." Rem. & Bal. Code, §§ 6292, 6293, 6294.

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Section 5 provides that there shall be printed on the ballot the words, "Shall the sale of intoxicating liquor be licensed within the" described unit; that the ballot shall contain the words: "For license" and "Against license;" that those favoring the licensing of the sale of intoxicating liquor within the unit shall indicate it by a cross within the square following the words "For license," and those desiring to vote against the licensing of the sale of intoxicating liquor within the unit shall make a like mark within the square following the words "Against license." (Rem. & Bal. Code, § 6296).

Section 6, after providing for canvassing the election returns and the certification, publication, and recording of the result of the election, provides: "and no intoxicating liquor, save as hereinafter provided, shall be sold within that unit until permission so to do be granted at an election held for that purpose under the provisions of this act." (Id., § 6297).

Section 9 provides:

"Whenever a majority of the qualified electors voting upon said question in any unit hereinbefore created, at an election held for that purpose, shall have failed to vote 'for license' and it shall thereby have been decided by said vote that intoxicating liquor shall not thereafter be sold within that unit . . . it shall not be lawful to sell, give away or in any manner dispose of intoxicating liquor in any quantity whatever, within the limits of the unit . . ."

saving the right of a person in his private dwelling or private apartments to give liquor to his guests. (Id., § 6300.)

Section 10 (Id., § 6301) provides that, within ten days after the result of the election has become operative, every retail liquor dealer, excepting druggists, shall remove all intoxicating liquor from his place of business, and that a failure to do so shall be *prima facie* evidence that such liquor is kept therein for sale or other disposition in violation of the act. Section 11 (Id., § 6302) provides:

"Whoever shall, either as principal, agent, clerk or servant, directly or indirectly, sell, barter, exchange, give away or otherwise dispose of any intoxicating liquor in any quan-

tity whatever, within the limits of a unit which has, by its vote, decided against the licensing of the sale of intoxicating liquor, or who shall keep or have in his possession any intoxicating liquor with intent to sell, give away or otherwise dispose of such liquor in violation of the provisions hereof,"

shall, upon conviction, be fined not less than \$20 nor more than \$200, *or* imprisoned in the county jail for not less than ten days nor more than thirty days, *or* be punished by both such fine and imprisonment. The section further provides that, upon a second conviction the penalty shall be a fine of not less than \$100 nor more than \$500 *and* imprisonment in the county jail for not less than ten days nor more than ninety days, and that, upon a third and each subsequent conviction, the penalty shall be a fine of not less than \$200 nor more than \$1,000, *and* imprisonment in the county jail not less than three months nor more than one year.

Section 12 defines what constitutes an unlawful sale, and is as follows:

"The giving away, delivering or handling of any intoxicating liquor by any storekeeper at any place of business, or the taking or soliciting of orders, or the making of agreements for the sale or delivery, or for the giving away, of any intoxicating liquor within the limits of a unit which shall have voted against licensing the sale of intoxicating liquor therein, or any other device to evade the provisions hereof, shall be deemed an unlawful sale . . ." (Id., § 6303).

Section 16 provides:

"It shall be unlawful for any physician to issue a prescription for intoxicating liquor except in writing or in any case unless such physician has good reason to believe that the person for whom it is issued is actually sick and the liquor is required as medicine." (Id., § 6307).

Section 17 provides:

"Nothing in this act shall be construed to forbid or prevent the sale within any unit which has voted against the sale of intoxicating liquor therein, by a druggist or pharmacist, of liquor upon prescription for medical purposes,

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or for sacramental purposes, or of alcohol for medicinal, mechanical or chemical purposes only, . . .” (Id., § 6308).

It further provides that the druggist shall keep a true and exact record of each sale, together with the name, residence, and street address of the purchaser, the date of the sale, the kind, quantity, and price of the liquor, the purpose for which it is sold and, if the sale is for medical purposes, the name of the physician issuing the prescription therefor; that the record shall be signed by the purchaser; that the prescription shall be marked “cancelled” and not refilled, and that the record shall be open to inspection by the prosecuting attorney of the county and the judge or justice of the peace having criminal jurisdiction therein or any sheriff, constable, marshal, or other police officer within the county. It is further provided that a violation of the provisions of the section shall be a misdemeanor. Section 18 provides:

“It shall be unlawful for any person, or public or private carrier, to accept or receive for shipment, transportation or delivery to any person or place within any unit in which the sale of intoxicating liquor is forbidden under the provisions of this act, or to carry, bring into or transfer to any other person, carrier or agent, or handle, deliver or distribute in any such unit any intoxicating liquor of any sort or character whatsoever; . . . *Provided, however,* That nothing herein contained shall be construed to apply . . . to shipments or deliveries at residences which are not places of business or of public resort, by manufacturers or wholesalers in their own conveyances, or by any common carrier or otherwise, any unbroken packages.” (Id., § 6309).

Section 20 (Id., § 6311) provides that the issuance of an internal revenue special tax stamp by the Federal government to any person as a retail dealer in intoxicating liquor, at any place within a dry unit, shall be *prima facie* evidence of the sale of intoxicating liquor by such person within such unit; provided “that this section shall not apply to wholesalers, manufacturers or druggists.”

Counsel for the respondent, after discussing and analyzing the statute, summarizes his contention as follows:

"From it all we must conclude that the legislature only intended by this act to place the question in the hands of the people to say whether retail liquor dealers should be permitted to carry on their business or not, and where by a vote of the people the local option law became effective, it was the sole intention to put the retail dealer out of business *and does not in any wise affect the business of a druggist, a manufacturer or a wholesaler.*" (The italics are counsel's.)

We cannot subscribe to this view. If this had been the intention of the legislature, the title of the act would have been limited to the question of licensing the retail dealer. The whole scope and purpose of the act, as we read it, is to promote temperance and sobriety, and to that end to permit the electors of each unit to prohibit the sale of intoxicating liquors within that unit, not by retail dealers alone, but absolutely except by druggists and pharmacists. The act we think speaks this construction and no other. If the legislature had intended that each unit should determine for itself whether intoxicating liquors should thereafter be sold by wholesalers, manufacturers, and druggists, only, it would have used language reasonably tending to express that view. If the respondent's construction of the statute is correct, one-half of the act is surplusage. It is conceded that the act does not, in direct terms, provide that wholesalers may sell within a dry unit, but the logic of the argument is that, because they are by inference permitted to exist within a dry unit, and because the wholesaler in wet territory may sell within that territory and deliver in unbroken packages to a purchaser within a dry unit, it follows that the wholesalers within the dry unit may both sell and deliver within such unit. The argument runs counter, not only to the obvious purpose of the act, but to some clear and express provisions to the contrary.

A reference to the sections of the act quoted makes it plain that the legislature was not niggardly in the use of the word

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“sale,” but rather that it used that word whenever and wherever it intended to permit a sale in a dry unit. This word occurs many times in the act. To illustrate: it is used once in the title of the act, twice in section 1, thrice in section 2, once in section 3, thrice in section 5, seven times in section 6, twice in section 7, twice in section 9, and a number of times in the following sections. As we have seen, section 6 expressly provides that, when a dry unit has been established and the result has become operative, “no intoxicating liquor save as hereinafter provided shall be sold within that unit until permission to do so be granted at an election held for that purpose.” By section 9 it is provided that, when a vote has become operative within a dry unit, it shall not be lawful to sell, give away, or in any manner dispose of intoxicating liquor “in any quantity whatever” within such unit. Section 11, as we have seen, forbids the sale, etc. “in any quantity whatsoever” within a dry unit, and provides severe penalties for those who offend its provisions. Section 12 defines an unlawful sale. Section 17 permits sales by druggists and pharmacists under careful and stringent restrictions, and it is the only section in the act which in terms permits a sale within a dry unit. Section 18 has reference to deliveries, and provides for the shipping and carrying of intoxicants into dry units in unbroken packages from some point without such unit, and seemingly permits the wholesaler, having his place of business within the dry unit, to deliver his goods therein. But this section does not, in the light of the other provisions of the act, permit him to sell his goods in a dry unit. The contention that the provision in section 10 affecting the retail liquor dealer, when read in connection with the provisos in sections 18 and 20, permits the wholesaler having his place of business in the dry unit to sell within such unit would, if upheld, do violence to other provisions of the act which expressly prohibit any sale within the unit except by druggists and pharmacists. Moreover, if the respondent may sell in a dry unit in defiance of

the express prohibitions in sections 6, 9, and 11, of the act, we can see no reason why he may not solicit orders in defiance of section 12 of the act, and the result would be that the liquor trade would be transferred from the former licensed and regulated retail liquor dealer to the unlicensed and unregulated wholesale dealer. A construction leading to such an absurdity will not be adopted.

The act is pregnant with but one meaning, and that meaning is that intoxicating liquors shall not be sold in dry units except by druggists and pharmacists. Any other view would take the life blood out of the act. The wholesaler within a dry unit must, like his competitor without that unit, make his sales in wet territory. As we have suggested, had it been the intention of the law-making body to permit a unit to prohibit only the sale of intoxicating liquors at retail, that purpose would have been expressly stated in both the title and the body of the act, and it would not have taken twenty-two sections to state it. To hold that the language in the proviso to section 18 implies the right of a wholesaler in a dry unit to both sell and deliver therein would be to read out of the statute words of clear and certain meaning, and to read into it a privilege which the law-making branch of the government deemed it wise to withhold. The provisions in the act that intoxicating liquors shall not be sold in a dry unit "in any quantity whatever," that the taking or soliciting of orders or the making of agreements for the sale or delivery therein shall be deemed an unlawful sale, the stringent penalties flowing from a violation of the act, the care taken to safeguard sales by druggists and pharmacists who are privileged to sell—all point to the conclusion that all sales of intoxicating liquors within a dry unit, not expressly permitted by the act, are prohibited.

"The general purpose or spirit of the act must always be held in view." *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302. When the object and general intent of a statute are ascertained, general words may be re-

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strained to it, and those of narrower import may be expanded to effectuate that intent. *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480. This construction of the statute is supported by the principles announced in the following cases: *State v. Maire*, 66 Wash. 591, 120 Pac. 87; *State v. Jones*, 66 Wash. 229, 119 Pac. 384.

The office of a proviso is thus defined in 36 Cyc. 1162-3:

"It should be construed together with the enacting clause, with a view to giving effect to each and to carrying out the intention of the legislature as manifested in the entire act. The enacting clause is of course the principal part of the statute, and, as its terms may be presumed to have embodied the main object of the act, the proviso should be strictly construed. . . . So the operation of a proviso is usually and properly confined to the clause or provision immediately preceding; . . ."

Towson v. Denson, 74 Ark. 302, 86 S. W. 661, defines its office as follows:

"When the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause, which does not fall fairly within its terms.' "

In *United States v. Bernays*, 158 Fed. 792, it is said that

"A proviso should be construed with reference to the subject-matter of the sentence of which it forms a part unless it clearly appears to be designed by the legislature for a broader or more independent operation."

"A construction of a proviso which is plainly repugnant to the body of the act is to be avoided if possible." 26 Am. & Eng. Ency. Law (2d ed.), 681.

Inasmuch as there are cases pending here involving the rights of the manufacturer under the terms of this act, we have refrained from making any direct reference to the following proviso to section 18:

"*Provided*, that nothing in this act shall be construed to prohibit the manufacture of intoxicating liquor from the raw material in any no-license unit, nor the delivery of the same."

We conclude that the trial court erred in sustaining the demurrer, and the judgment is reversed.

DUNBAR, C. J., CROW, and PARKER, JJ., concur.

[No. 10065. Department One. March 11, 1912.]

MAKINS PRODUCE COMPANY, *Appellant*, v. I. P. CALLISON,
Respondent.¹

JUDGMENT—RES JUDICATA—SALES—ACTION FOR PRICE—DEFENSES—CONDITION OF ARTICLE. In an action for the price of butter sold and delivered, which defendant rejected because in bad condition and not according to sample, a judgment in a proceeding *in rem* by the state inspector condemning the butter as "renovated" butter, the sale of which was prohibited, is admissible in evidence to prove the condition of the butter at the time it was seized.

JUDGMENT—RES JUDICATA—PARTIES AND MATTERS CONCLUDED. In an action for the price of butter sold and delivered, a judgment in a proceeding *in rem* condemning the butter as "renovated" butter, is not, as a matter of law, final and conclusive upon the plaintiff as to the status and condition of the butter at the time it was sold to the defendant three and one-half months before its seizure, where the facts were all in dispute.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 1, 1911, dismissing an action for the price of goods sold and delivered, upon withdrawing the case from the jury at the close of plaintiff's evidence. Reversed.

Boner & Boner, for appellant.

John C. Hogan, for respondent.

PARKER, J.—This action was commenced by the plaintiff in the superior court for Chehalis county, to recover from the defendant \$1,359.43 claimed as the purchase price of butter sold to the defendant. The cause proceeded to trial before the court and a jury; and at the conclusion of the evi-

¹Reported in 121 Pac. 837.

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dence, the court, upon motion of counsel for the defendant, withdrew the cause from the consideration of the jury, and rendered a judgment of dismissal against the plaintiff. From this disposition of the cause, the plaintiff has appealed to this court.

Appellant is a dealer in butter and other products, having its place of business in San Francisco, California. The respondent is a dealer in similar products, having his place of business in Aberdeen, in this state. The complaint is in usual form, simply alleging the sale and delivery of the butter, the amount of the agreed price to be paid therefor, and respondent's failure to pay the same. The issues in the case arise upon the affirmative defense contained in respondent's answer, wherein he alleges that the butter was sold to him by sample:

"That upon inspection it was found by the defendant that said pretended butter was not in any respect according to the sample theretofore shipped and that said pretended butter was wholly unfit for use and was entirely worthless as an article of food, of which facts the defendant notified the plaintiff that the defendant held said property subject to the order of the plaintiff to which the plaintiff agreed and acquiesced and thereafter treated said property as its own, and said property was worse than worthless to the defendant in his said business as a wholesale dealer; that said pretended butter was in fact what is called 'renovated' butter and the sale thereof prohibited by the laws of the state of Washington, except under certain specified conditions; that the plaintiff, in violation of the laws of the state of Washington, did not inform the defendant that the said pretended butter was renovated butter, and the defendant was ignorant of that fact at the time of ordering same and did not learn of that fact until some time thereafter; that on the 14th day of October, 1909, all of said pretended butter was seized by the dairy and pure food inspector of the state of Washington acting under authority of law, and the said dairy inspector of the state of Washington on the 14th day of October, 1909, filed a petition in the superior court of the state of Washington for the condemnation of said pretended butter and for the confiscation thereof according to law; that an

order to show cause upon said petition addressed to this defendant was issued in said proceedings made returnable October 26th, 1909, and that this defendant immediately notified the plaintiff of said proceedings and demanded of the plaintiff that the said plaintiff defend said proceedings, and the defendant tendered to the plaintiff the defense of said proceeding and the plaintiff did in a manner undertake the defense of said proceedings and caused certain affidavits to be filed therein, and that upon the hearing had in said proceeding before the said superior court said pretended butter was condemned and confiscated by the order and judgment of the superior court."

Appellant's reply to this new matter is in effect a denial thereof.

The butter was received by respondent at Aberdeen about July 1, 1909. Sometime thereafter, there arose some controversy between the parties as to the quality of the butter and as to whether or not it was according to sample, when respondent notified appellant that he rejected the butter and held it subject to appellant's order. The evidence is in conflict as to the condition of the butter when it was received, as to whether it was according to sample, as to whether or not it was renovated butter, and also as to whether or not appellant had agreed to take the butter back and treat the sale as rescinded. It seems clear to us that none of these disputed questions could, in the light of the evidence, have been determined by the court as a matter of law, but called for the submission of the cause to the jury; unless it be held that the condemnation proceeding and judgment alleged in the affirmative answer, the record of which was introduced in evidence, constituted a conclusive adjudication as against appellant establishing facts from which it could be decided, as a matter of law, that appellant cannot recover in this action. The learned trial court withdrew the case from the jury and rendered his decision upon the ground that that condemnation proceeding and judgment was *res judicata* of facts, which conclusively determined all issues of fact in this action against appellant. We will now notice that ad-

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judication and the effect of it upon appellant's rights which are involved in this action.

We have noticed that the butter sold by appellant to respondent was received by respondent at Aberdeen about July 1st, 1909. The condemned butter was seized by the state dairy inspector on October 12, 1909, who immediately thereafter commenced the condemnation proceedings in the superior court for Chehalis county, alleging that the seized butter was then "renovated butter." This proceeding resulted in a condemnation judgment. This it will be noticed was about three and one-half months after the delivery of the butter to respondent which had been sold to him by appellant. The evidence shows that, soon thereafter, respondent notified appellant by letter of the seizure and commencement of the condemnation proceedings, and requested appellant to defend the same. Appellant then apparently taking it for granted from the statements in respondent's letter that the butter seized and sought to be condemned was the same butter sold and delivered by it to respondent, some three and one-half months previous, but evidently having no other information on that subject, caused an affidavit to be made by George Makins, at San Francisco, touching the nature and condition of the butter sold and delivered by it to respondent, in effect denying that that butter was then renovated butter. This affidavit was transmitted by appellant to respondent enclosed with a letter, stating as follows:

"San Francisco, October 25, 1909.

"Chehalis Produce Co.,

"Aberdeen, Washington.

"Gentlemen: Upon receipt of your letter this morning advising us that the state pure food inspector was about to take the butter which you have there unless we make some defense, we wired you that we would mail you to-day papers to show that he had no right to seize the butter. We enclose herewith affidavit of the writer as to what this butter is. We cannot see whereby the state inspector has any reason to condemn the butter.

"We wish further to state that if he will release the butter, that we will withdraw same from the state and have it sold elsewhere, providing it is agreeable to you, and thereby mitigate the damage as much as possible to the party injured. After the butter has been sold and disposed of, we will endeavor to come to some terms as to who should stand the loss. Understand if this is not agreeable to you, we would not care to take the butter away, and will hold you liable for the full amount. It seems to us, however, that there is no question but what this butter can be sold at the proper place. . . .

"Very truly yours,

"Makins Produce Co.

"By Geo. Makins."

This affidavit was filed in the condemnation proceeding by respondent, with an affidavit of his own wherein he, in effect, disclaims ownership of the butter which had been seized, stating that it was held by him subject to appellant's order. Appellant was never served with any process in the condemnation proceedings and apparently had no knowledge of it save such as respondent communicated to it, and did nothing towards appearing therein or defending the same other than as indicated in its letter and the affidavit sent to respondent. This, however, we think did not make appellant a party to that action, any more than he and all the world were parties thereto by virtue of it being a proceeding *in rem*.

The substance of the contentions of counsel for appellant may be stated as follows: (1) That the condemnation proceeding and judgment is not admissible in evidence against it in this action for any purpose; and (2) that the condemnation judgment in no event was an adjudication of matters from which the court could decide, as a matter of law, against appellant's right of recovery in this case, even though it may be admissible in evidence to prove the condition of the butter which was seized and condemned, at the time of such seizure, and even though the judgment may be conclusive upon that single fact as against appellant.

Let us first inquire, Was this judgment admissible in evidence for any purpose? Argument in support of the view

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that this seizure and condemnation of butter was a proceeding *in rem* seems hardly necessary. It was prosecuted under the authority given by Rem. & Bal. Code, §§ 5447c, 5447e, relating to the sale of dairy products and prohibiting the sale of "renovated butter" except under certain conditions. The petition of the dairy inspector for the condemnation, charges that the butter seized by him was renovated butter. Reading the judgment alone, it is not clear that the butter was adjudged to be renovated butter, but read in connection with the petition seeking its condemnation, it seems plain that the judgment had the effect of adjudicating that it was renovated butter at the time of its seizure, for that was the real issue for determination in that case and was necessarily so determined by the rendition of the judgment. The proceeding was conducted, as the state law evidently contemplates it should be, upon the same principle as the Federal government proceeds in its revenue condemnation cases; and judgments in such cases, being *in rem*, are held to be conclusive upon all persons in so far as such judgments determine the status of the property condemned, at the time of its seizure. In 2 Black on Judgments, § 799, the author says:

"A judgment rendered by a competent court, declaring the condemnation or forfeiture of goods seized for a breach of the excise or revenue laws, is strictly *in rem*, and is binding and conclusive upon all persons, so that the legality of the seizure cannot be again contested in any proceeding, nor will trespass lie against the officer who took the goods, for the purpose of trying the question anew. In one of the English cases it appears that the action was for the price of liquor sold by the plaintiff, and the defense was interposed that the liquor was adulterated, to prove which fact the defendant offered in evidence the record of its condemnation in the Court of Exchequer. It was held that the record was admissible, as that proceeding was *in rem*."

See, also, *Hart v. M'Namara*, 4 Price (Exch. Rep.), 154; *Kriess v. Faron*, 118 Cal. 142, 50 Pac. 388; 23 Cyc. 1408-1410.

We are of the opinion, in view of the fact that this condemnation judgment was rendered in a proceeding *in rem* by a court having jurisdiction of the *res*, that the record of the proceeding and judgment was in any event admissible in evidence to prove the status of the condemned butter at the time it was seized. Proof of this fact was rendered admissible by the testimony which tended to show that the condemned butter was the same butter which appellant had sold and delivered to respondent.

Let us next inquire, Was the condemnation judgment an adjudication of all issues of fact here involved, so as to enable the court to decide, as a matter of law, against appellant's right to recover in this action? The judgment may have been admissible in evidence, and still not be conclusive upon all facts which were necessary for respondent to prove in support of his affirmative defense in order to successfully resist appellant's claim. The only fact with which we are here concerned which was adjudicated in the condemnation proceeding, as against all persons including appellant, is the fact that the butter was renovated butter at the time of its seizure. It was not finally adjudicated by that judgment that the condemned butter was renovated butter on July 1st, three and one-half months before its seizure, nor that the butter so condemned was the butter which was sold and delivered by appellant to respondent, nor was it an adjudication determining that appellant had agreed to take the butter back and regard the sale as rescinded. These facts were all in dispute and the evidence was conflicting relative thereto. Surely appellant had the right to prove that the butter it furnished respondent was so furnished according to sample; that it was not then renovated butter; that it was not the butter which was condemned; and that no agreement or understanding was arrived at as to appellant taking the butter back and regarding the sale as rescinded. However conclusive that condemnation judgment may be as to the status and condition of the condemned butter at the time

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of its seizure, that judgment is not conclusive as to any of these other disputed facts upon which the respective rights of the parties depend. In the recent case of *McCann v. Ellis* (Ala.), 55 South. 303, involving the probate of a will which is, in a sense, a proceeding *in rem*, there being nothing involved except the status of the will, the court observed:

"It has been uniformly ruled by all English and American cases which we have examined that proceedings to probate or to set aside the probate of wills are proceedings *in rem* and not *in personam*; that such proceedings are exclusively to determine the status of the *res*, and not the rights of the parties. Judgments or decrees as to the status of the *res*, in proceedings strictly *in rem*, are conclusive against all the world as to that status."

Nothing was involved in the condemnation case which became *res judicata* by the judgment therein, as against all the world, save the condition of the condemned butter at the time of its seizure. The following cases involving lien foreclosures, bankruptcy adjudications and probate decrees are instructive as showing the limited effect of such adjudications: *Ward v. Green* (Tex. Civ. App.), 28 S. W. 574; *Toby v. Brown*, 11 Ark. 308; *Sly v. Hunt*, 159 Mass. 151, 34 N. E. 187, 38 Am. St. 403, 21 L. R. A. 680, and note; *Tilt v. Kelsey*, 207 U. S. 43; *Manson v. Williams*, 213 U. S. 453.

In the very recent case of *Lewers & Cooke v. Atcherly*, 32 Sup. Ct. 94, decided by the supreme court of the United States, December 4, 1911, involving a probate decree and its effect as an adjudication, Justice Holmes, speaking for the court, observed:

"Of course, the later decree establishing the will does not affect the case. That determined only that Kaniu left all her property to Kalakaua, but not that any particular property belonged to the inheritance."

In 2 Black on Judgments, § 795, the limited effect of judgments *in rem* is indicated as follows:

"It is commonly said that such a judgment binds 'all the

world.' It is more accurate to say that the judgment is conclusive against any person, in any subsequent controversy, where the grounds of the adjudication, or the fact of its rendition, or any of its legal consequences, become relevant and material facts."

Counsel for respondent rest their contentions as to this condemnation judgment being *res judicata* of all facts which enable the court to determine all the issues here involved, as a matter of law without submission of the cause to the jury, upon the decision of the supreme court of California in *Kriess v. Faron*, 118 Cal. 142, 50 Pac. 388, which we have above cited in support of the view that the judgment was admissible in evidence. In that case, the plaintiff sought to recover the purchase price of certain personal property which was being used in connection with a brewery, the brewery being leased to the purchaser of the personal property at the same time. It appears from the opinion that, at the time of the sale, the property was subject to seizure and confiscation by reason of the fact that it was then, and for some time prior had been, used in such manner as to render it liable to seizure and confiscation under the revenue law of the United States. A short time after the sale, it was seized by a revenue officer and thereafter condemned by judgment of a United States district court, in a proceeding *in rem* prosecuted for that purpose. In the action to recover the purchase price of that sale, the purchaser, who was defendant therein, offered in evidence that condemnation judgment for the purpose of showing failure of consideration for the purchase price, he having lost the property by the condemnation judgment. It was held by the lower court, and also the supreme court of that state, that that judgment was admissible in evidence in that action and conclusive of the status of the property at the time of the sale. It is true that the seizure and condemnation was some time after the sale, but it appears to have been conceded that the facts rendering the property liable to seizure and confiscation under the revenue

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laws of the United States were the same at the time of the sale as at the time of the seizure and confiscation, nor was there any dispute as to the identity of the property so confiscated. Under such a state of facts, it is easy to see how the only disputed fact in the case being proven by an adjudication *in rem*, enabled the court to decide, as a matter of law, the whole controversy upon the ground that the judgment of condemnation conclusively decided the only fact in controversy, and hence, decided against plaintiff's right of recovery. The plaintiff had simply attempted to sell to the defendant property which, at the time of the sale, was subject to seizure and confiscation. It was so adjudged in the condemnation proceeding, which was a proceeding *in rem*, binding upon the plaintiff as well as upon all others. We have seen that, in the case before us, there are involved disputed facts upon which the evidence is conflicting, which were not decided and could not be decided in the condemnation judgment relied upon in this case as a former adjudication of all the issues here involved.

We conclude that, while the condemnation judgment was admissible in evidence in this case in view of all of the other evidence introduced, it was not decisive of all facts here involved, in respondent's favor. It follows that the learned trial court erred in withdrawing the case from the jury. For that reason, the judgment must be reversed and a new trial awarded to appellant. It is so ordered.

CHADWICK, GOSE, and CROW, JJ., concur.

[No. 10038. Department One. March 13, 1912.]

LEE RICHMOND, *Respondent*, v. TACOMA RAILWAY & POWER
COMPANY *et al.*, *Appellants*.¹

STREET RAILROADS—NEGLIGENCE—INJURY TO PEDESTRIAN — QUESTION FOR JURY. The question of the negligence of a street car company, in running down a pedestrian at a street crossing, is for the jury, where it appears that the car passed another standing car taking on passengers at a crossing, traveling at a speed of 25 or 30 miles an hour, the speed limit being 20 miles an hour, that no effort was made to reduce speed until opposite the standing car, in violation of rules of the company, and that the car struck plaintiff on the far crossing after going 51 feet, and traveled 150 feet before it was stopped.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of a pedestrian, running across street car tracks on the west side of a street crossing, to catch a waiting car on the tracks on the east side of the street, is for the jury, where plaintiff looked when 45 feet from the track, where he had a view for 200 feet, and saw no street car approaching, but was struck while crossing by a car exceeding the speed limit and traveling 25 or 30 miles an hour; since he need not stop to look and listen; contributory negligence involving affirmative proof of the fact, which is more than a mere failure of required affirmative proof.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is harmless error to give an instruction as to plaintiff's right to recover, although negligent, if the defendant had the last clear chance to avoid the accident, there being no evidence warranting its submission, where the jury by a special verdict found that the plaintiff was not guilty of contributory negligence.

STREET RAILROADS—NEGLIGENCE—INJURY TO PEDESTRIAN — VIOLATION OF SPEED ORDINANCE—INSTRUCTIONS. A pedestrian, struck by a car exceeding the speed limit, is presumed to know the local laws and is therefore entitled to an instruction that he had a right to assume that street cars would not exceed the speed limit in passing the crossing, although there was no evidence that he knew of the ordinance limiting the speed.

SAME. An instruction that plaintiff, struck by a street car at a crossing, had a right to assume that the car would not exceed the speed limit, is not objectionable as relieving the plaintiff from the

¹Reported in 122 Pac. 351.

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Citations of Counsel.

charge of contributory negligence, where it plainly stated that, yet if such limit was exceeded, he would not be relieved of the obligation to exercise due care.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 9, 1911, upon the verdict of a jury, rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a street car. Affirmed.

John A. Shackelford and *F. D. Oakley*, for appellants, contended, *inter alia*, that this court has in many cases held that a person is guilty of contributory negligence (a) where, before going upon street car tracks, he fails to exercise his senses to discover the approach of a car; (b) where he so carelessly looks or listens that he does not see an approaching car plainly visible for some distance; and (c) where he looks only when some distance from the tracks and does not again look before attempting to cross the track. *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Helber v. Spokane St. R. Co.*, 22 Wash. 319, 61 Pac. 40; *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Mey v. Seattle Elec. Co.*, 47 Wash. 497, 92 Pac. 283; *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458; *Borg v. Spokane Toilet Supply Co.*, 50 Wash. 204, 96 Pac. 1037, 19 L. R. A. (N. S.) 160; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471; *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51. The great weight of authority sustains the rule that a pedestrian is guilty of contributory negligence if, before crossing street car tracks, he fails to exercise his senses to discover the approach of cars operated by electricity. *Birmingham R., L. & P. Co. v. Oldham*, 141 Ala. 195, 37 South. 452; *McGee v. Consolidated St. R. Co.*, 102 Mich. 107, 60 N. W. 293,

47 Am. St. 507, 26 L. R. A. 300; *Wider v. Detroit United R.*, 147 Mich. 537, 111 N. W. 100; *Hickey v. St. Paul City R. Co.*, 60 Minn. 119, 61 N. W. 893; *Terien v. St. Paul City R. Co.*, 70 Minn. 532, 73 N. W. 412; *Timler v. Philadelphia Rapid Transit Co.*, 214 Pa. 475, 63 Atl. 824; *Manos v. Detroit United R. Co.* (Mich.), 130 N. W. 664; *McGee v. St. Joseph R. etc. Co.*, 153 Mo. App. 492, 133 S. W. 1194; *McCabe v. International R. Co.*, 143 App. Div. 710, 128 N. Y. Supp. 285; *Riedel v. Wheeling Traction Co.*, 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123; *Cain v. Macon Consol. St. R. Co.*, 97 Ga. 298, 22 S. E. 918; *Indianapolis St. R. Co. v. Zaring*, 33 Ind. App. 297, 71 N. E. 270, 501; *Young v. Citizens' St. R. Co.*, 148 Ind. 54, 44 N. E. 927, 47 N. E. 142; *Beem v. Tama & T. Elec. R. & L. Co.*, 104 Iowa 563, 73 N. W. 1045; *Ames v. Waterloo & C. F. Rapid Transit Co.*, 120 Iowa 640, 95 N. W. 161; *Burns v. Metropolitan St. R. Co.*, 66 Kan. 188, 71 Pac. 244; *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344; *Heebe v. New Orleans & C. R. L. & P. Co.*, 110 La. 970, 35 South. 251; *Snider v. New Orleans & C. R. Co.*, 48 La. Ann. 1, 18 South. 695; *Dieck v. New Orleans City & L. R. Co.*, 51 La. Ann. 262, 25 South. 71; *Canedo v. New Orleans & C. R. Co.*, 52 La. Ann. 2149, 28 South. 287; *Moore v. Lindell R. Co.*, 176 Mo. 538, 75 S. W. 672; *Ries v. St. Louis Transit Co.*, 179 Mo. 1, 77 S. W. 734; *Riska v. Union Depot R. Co.*, 180 Mo. 168, 79 S. W. 445; *Petty v. St. Louis & M. R. R. Co.*, 179 Mo. 666, 78 S. W. 1003; *Brown v. Elizabeth, P. & C. J. R. Co.*, 68 N. J. L. 618, 54 Atl. 824; *McGrath v. North Jersey St. R. Co.*, 66 N. J. L. 312, 49 Atl. 523; *Hageman v. North Jersey St. R. Co.*, 74 N. J. L. 279, 65 Atl. 834; *Thompson v. Buffalo R. Co.*, 145 N. Y. 196, 39 N. E. 709; *Baxter v. Auburn & S. Elec. R. Co.*, 190 N. Y. 439, 83 N. E. 469; *Pinder v. Brooklyn Heights R. Co.*, 173 N. Y. 519, 66 N. E. 405; *Smith v. City R. Co.*, 29 Ore. 539, 46 Pac. 136, 780; *Wolf v. City R. Co.*, 45 Ore. 446, 72 Pac. 329, 78 Pac. 668; *Boring v.*

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Citations of Counsel.

Union Traction Co., 211 Pa. St. 594, 61 Atl. 77; *Watkins v. Union Traction Co.*, 194 Pa. St. 564, 45 Atl. 321; *Tesch v. Milwaukee Elec. R. & L. Co.*, 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; *Goldmann v. Milwaukee Elec. R. & L. Co.*, 123 Wis. 168, 101 N. W. 384; *Beerman v. Union R. Co.*, 24 R. I. 275, 52 Atl. 1090; *Price v. Rhode Island Co.*, 28 R. I. 220, 66 Atl. 200, 125 Am. St. 736; *Dunn v. Old Colony St. R. Co.*, 186 Mass. 316, 71 N. E. 557; *Blackwell v. Old Colony St. R. Co.*, 193 Mass. 222, 79 N. E. 335; *Fitzgerald v. Boston Elev. R. Co.*, 194 Mass. 242, 80 N. E. 224; *Hooks v. Huntsville R. L. & P. Co.*, 147 Ala. 700, 41 South. 273; *Berger v. Rapid Transit Co.*, 141 Fed. 120. And where one looks or listens, but fails to see or hear a car which is plainly visible for some distance, he is nevertheless guilty of contributory negligence. *Willis v. Boston & N. St. R. Co.*, 202 Mass. 463, 89 N. E. 31; *Russell v. Minneapolis St. R. Co.*, 83 Minn. 304, 86 N. W. 346; *Farese v. North Jersey St. R. Co.*, 76 N. J. L. 457, 69 Atl. 959; *Stassen v. New York City R. Co.*, 52 Misc. Rep. 577, 102 N. Y. Supp. 468; *Madigan v. Third Avenue R. Co.*, 68 App. Div. 123, 74 N. Y. Supp. 143; *Newcomb v. Metropolitan St. R. Co.*, 36 Misc. Rep. 787, 74 N. Y. Supp. 858; *Nugent v. Philadelphia Traction Co.*, 181 Pa. St. 160, 37 Atl. 206; *Mathews v. Rhode Island Co. (R. I.)*, 77 Atl. 865. So, also, a pedestrian is guilty of contributory negligence, as a matter of law, where he looks only when he is some distance from the track and does not look again for the approach of the car before stepping upon the track. *Wecker v. Brooklyn etc. R. Co.*, 136 App. Div. 340, 120 N. Y. Supp. 1020; *Glynn v. New York City R. Co.*, 110 N. Y. Supp. 836; *Ayres v. Forty-Second St. etc. R. Co.*, 54 Misc. Rep. 639, 104 N. Y. Supp. 841; *Lynch v. Third Avenue R. Co.*, 88 App. Div. 604, 85 N. Y. Supp. 180; *Keough v. Interurban St. R. Co.*, 92 N. Y. Supp. 733; *Healy v. United Traction Co.*, 115 App. Div. 868, 101 N. Y. Supp. 331; *Solomon v. New York City R. Co.*, 50 Misc. Rep. 557, 99 N. Y. Supp. 529; *Morice*

v. Milwaukee Elec. R. & L. Co., 129 Wis. 529, 109 N. W. 567; *Denver City Tramway Co. v. Cobb*, 164 Fed. 41; *Pittsburgh R. Co. v. Cluff*, 149 Fed. 732; *Merritt v. Foote*, 128 Mich. 367, 87 N. W. 262; *Ross v. Metropolitan St. R. Co.*, 113 Mo. App. 600, 88 S. W. 144; *Paul v. United Rys. Co. of St. Louis*, 152 Mo. App. 577, 134 S. W. 3; *Kraut v. Public Service R. Co.*, 79 N. J. L. 408, 75 Atl. 165; *Davis v. Detroit United R. Co.*, 162 Mich. 240, 127 N. W. 323. Submitting to the jury the issue of the "last clear chance," was misleading and reversible error. *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51; *Rissler v. St. Louis Transit Co.*, 113 Mo. App. 120, 87 N. W. 578; *Guyer v. Missouri Pac. R. Co.*, 174 Mo. 344, 73 S. W. 584; *Gabriel v. Metropolitan St. R. Co.*, 130 Mo. App. 651, 109 S. W. 1042; *Gumm v. Kansas City Belt R. Co.*, 141 Mo. App. 306, 125 S. W. 796; *Hartman v. St. Louis Transit Co.*, 112 Mo. App. 439, 87 S. W. 86; *St. Louis, I. M. & S. R. Co. v. Woodward*, 70 Ark. 441, 69 S. W. 55; *Atchison etc. R. Co. v. Baker* (Ind. Ter.), 104 S. W. 1182; *Atchison etc. R. Co. v. Baker*, 21 Okl. 51, 95 Pac. 433; *Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681; *Atchison etc. R. Co. v. Wells*, 56 Kan. 222, 42 Pac. 699; *Gulf, C. & S. F. R. Co. v. Johnson*, 91 Tex. 569, 44 S. W. 1067; *Powers v. Des Moines City R. Co.*, 143 Iowa 427, 121 N. W. 1095; *Doherty v. Des Moines City R. Co.*, 137 Iowa 358, 114 N. W. 183; *Coal Run Coal Co. v. Coughlin*, 19 Ill. App. 412; *Chicago & A. R. Co. v. Robinson*, 106 Ill. 142; *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565; *Henderson v. Detroit Citizens' St. R. Co.*, 116 Mich. 368, 74 N. W. 525; *Bennichsen v. Market St. R. Co.*, 149 Cal. 18, 84 Pac. 420; *Louisville & N. R. Co. v. Joshlin*, 33 Ky. Law 513, 110 S. W. 382; *Louisville R. Co. v. Buckner's Adm'r* (Ky.), 113 S. W. 90; *Illinois Cent. R. Co. v. France's Adm'r*, 130 Ky. 26, 112 S. W. 929; *Louisville & N. R. Co. v. Veach's Adm'r*, 129 Ky. 775, 112 S. W. 869; *Southern R. Co. v. Simmons*, 105 Va. 651, 55 S. E. 459; *Chesapeake & O. R. Co.*

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Citations of Counsel.

v. Hall's Adm'r, 109 Va. 296, 63 S. E. 1007; *Fonda v. St. Paul City R. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. 341.

Davis & Neal, *A. O. Burmeister*, and *Dunkleberger & Heinly*, for respondent, contended, among other things, that the case made a question for the jury. *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902; *Buriam v. Seattle Elec. R. Co.*, 26 Wash. 606, 67 Pac. 214; *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Baldie v. Tacoma R. & Power Co.*, 52 Wash. 75, 100 Pac. 162; *Budman v. Seattle Elec. R. Co.*, 61 Wash. 281, 112 Pac. 356; *Tecklenburg v. Everett R. L. & W. Co.*, 59 Wash. 384, 109 Pac. 1036, 34 L. R. A. (N. S.) 784; *Hays v. Tacoma R. & Power Co.*, 106 Fed. 48; *Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433, 42 N. E. 238, 1028; *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920; *Cooke v. Baltimore Traction Co.*, 80 Md. 551, 31 Atl. 327; *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 44 Pac. 1046, 57 Am. St. 726; *Smith v. Union Trunk Line*, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169; *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 347. It has been held almost universally that the court cannot fix the place at which the pedestrian shall look; it is a question for the jury. *Hecker v. Oregon R. Co.*, 40 Ore. 6, 66 Pac. 270; *Warren v. Southern Cal. R. Co.* (Cal.), 67 Pac. 1; *Winey v. Chicago, M. & St. P. R. Co.*, 92 Iowa 622, 61 N. W. 218; *Cummings v. Chicago, R. I. & P. R. Co.*, 114 Iowa 85, 86 N. W. 40; *Hicks v. New York, N. H. & H. R. Co.*, 164 Mass. 424, 41 N. E. 721, 49 Am. St. 471; *Louisville & N. R. Co. v. Cooper*, 23 Ky. Law 1658, 65 S. W. 795; *Defrieze v. Illinois Cent. Co.* (Iowa), 94 N. W. 505; *Cookson v. Pittsburg & W. R. Co.*, 179 Pa. St. 184, 36 Atl.

194; *Greene v. Los Angeles Terminal R. Co.* (Cal.), 69 Pac. 694; *Smith v. Baltimore & O. R. Co.*, 158 Pa. St. 82, 27 Atl. 847; *Moore v. Chicago, St. P. & K. C. R. Co.*, 102 Iowa 595, 71 N. W. 569; *Piper v. Chicago, M. & St. P. R. Co.*, 77 Wis. 247, 46 N. W. 165; *Plummer v. Eastern R. Co.*, 73 Me. 591; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Rodrian v. New York, N. H. & H. R. Co.*, 125 N. Y. 526, 26 N. E. 741; *Link v. Philadelphia & Reading R. Co.*, 165 Pa. St. 75, 30 Atl. 820, 822; *Ely v. Pittsburgh, C., C. & St. L. R. Co.*, 158 Pa. St. 233, 27 Atl. 970; *Chaffee v. Boston & L. R. Co.*, 104 Mass. 108; *Henavie v. New York Cent. & H. R. R. Co.*, 166 N. Y. 280, 59 N. E. 901; *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37. A pedestrian has a right to presume that a car will be operated at a lawful rate of speed. *Riska v. Union Depot R. Co.*, 180 Mo. 168, 79 S. W. 445; *Eckhard v. St. Louis Transit Co.*, 190 Mo. 593, 89 S. W. 602; *Deitring v. St. Louis Transit Co.*, 109 Mo. App. 524, 85 S. W. 140.

PARKER, J.—This action was commenced in the superior court for Pierce county, to recover damages for personal injuries which the plaintiff alleges resulted to him from the operation of one of the street cars belonging to the defendant Tacoma Railway & Power Company. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

Appellant Tacoma Railway & Power Company is the owner of an electric street railway system in the city of Tacoma. Appellant A. B. Justice was, on the 27th day of July, 1910, an employee of the company in charge of one of its street cars as motorman, when respondent was struck and injured by the car at the crossing of South 52d and M streets in the city. The negligence charged against appellants is, in substance, that the car was being run at an excessive and unlawful rate of speed, and without any warning of its approach to the crossing until too late to enable respondent to

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avoid being injured by it while crossing the track on which it was approaching. Appellants deny the negligence charged against them, and affirmatively allege that respondent's injuries were the result of his own want of care and contributory negligence.

The first and principal contention made by counsel for appellants is that the trial court erred in denying their motions for an instructed verdict and for judgment notwithstanding the verdict. This involves their right to have a determination of the cause in their favor upon the evidence as a matter of law, and we will first notice the facts upon which this question must be determined.

The evidence is not free from conflict, but a careful reading of the entire record convinces us that the evidence was sufficient to warrant the jury in regarding the following facts as established thereby. One of the company's lines is a double track street railway running north and south on M street, where it crosses South 52d street. This crossing is in a somewhat thickly populated residence district of the city. At the northwest corner of this crossing is a grocery store building fronting directly upon M street. This is a crossing at which very frequent stops are made by the cars for the purpose of letting off and taking on passengers. The cars run north upon the east track and south upon the west track. Respondent was familiar with the locality and the manner of operating cars there. He had resided for a considerable time some two blocks to the west of the crossing, and was accustomed to go from his home along the south sidewalk of 52d street to take north-bound cars, which, according to custom, stopped at the north sidewalk crossing.

On the morning of July 27, 1910, respondent started from his home to take a north-bound car. He had proceeded but a short distance when he saw a north-bound car coming some distance to the south. He then increased his pace, walking very fast, and also running at least a part of the distance, in order to reach the car when it would stop at the north side-

walk crossing. As he proceeded east along the south side of 52d street, he could not see north along M street any great distance because the grocery store building at the northwest corner obstructed his view to the north, until he reached a point near M street. When he was near M street and about 45 feet from the street car track, he could have seen a car coming from the north on the west track, had such car been within a distance of about 200 feet from the south sidewalk crossing towards which he was going. He then looked to the north along M street and did not see any car coming from that direction. He hurriedly proceeded on his way, then running, and reached the west track at the south sidewalk crossing just after the north-bound car passed that point on the east track, and about the time that car was stopping at the north sidewalk crossing. He intended to pass round to the rear of that car and get on it on the east side, entrance thereto being on that side only because of the double track. While he was crossing the west track and evidently while he was near to the east side thereof, he was struck by a swiftly moving south-bound car and thrown to the south and east, landing near or upon the east track.

He did not look for the coming of the north-bound car after he was about 45 feet from the track, but hurriedly proceeded on his way, evidently thereafter intent only on reaching the north-bound car before it started from the north sidewalk crossing where he expected it to stop. He does not remember of hearing any warning, by bell or whistle, of the approach of the south-bound car. This may be accounted for by the noise of the other car coming to a stop and the rapid succession of events then occurring, though it seems highly probable that a bell warning was given from the south-bound car about the time it passed the north sidewalk crossing and the other car which was there. Such signal was, in any event, given only a very short time before respondent was struck, and while the car was moving very fast.

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He says he did not see the south-bound car at any time. If his story is to be believed, it is evident that that car had not reached a point where it could be seen by him when he looked north from a point 45 feet distant from the track, so the car was then at least 200 feet north of the south sidewalk crossing. That car passed the north sidewalk crossing while the other car was there, at a speed of 25 miles an hour, as estimated by one witness, and another witness, who had been a street car conductor, estimated its speed at that point at 30 miles an hour. These were apparently disinterested witnesses and seemed to have had fairly good opportunities for observing the speed of the car, though witnesses for the appellant disagreed with them. The brakes were first applied and an effort made to check the speed of the car at about the time it passed the north crossing and the other car. It had then only 51 feet to run before reaching the south crossing, where it struck respondent. Its speed was checked to some extent before reaching respondent, but it was evidently then still continuing at a considerable speed, for it was not finally stopped until it ran a hundred feet or more after striking respondent. One witness testified that it ran 150 feet, arriving at that conclusion by knowing the width of the lots fronting upon the street and knowing the place where it finally stopped.

There was then in force in the city of Tacoma an ordinance of the city regulating the speed of street cars within the city limits, which limited the speed of cars upon double-track lines in this part of the city to twenty miles per hour. For the purpose of showing the duty of the motorman in controlling his car while passing over crossings and passing other cars while stopped to let off and take on passengers at crossings, respondent called the superintendent of the company as a witness, who was interrogated and answered as follows:

"Q. I will ask you to state whether or not the company had any rules relative to the operation of a street car in passing

another car standing at a crossing taking on passengers, or just going up to the crossing for the purpose of taking on and letting off passengers? A. Yes, sir. Q. I will ask you what that rule was? A. Cars passing another car, discharging or loading passengers are required to reduce speed and sound gong. Q. Reduce the speed to what? A. What the motorman would consider a safe rate of speed. . . . Q. Would that be for the purpose of enabling him to stop and avoid injuries to people who might get in front of his car? A. Yes, that is the idea. Q. The object of that rule is to protect passengers who are going to or are taking the other car? A. It is not altogether; people might be crossing the street and a view of the passing car obstructed by the standing car; that is a rule that is for the safety of any one, pedestrians, horses or passengers or any one else. Q. For the protection of the public generally? A. Yes, sir. Q. There is no particular speed to which it is reduced? A. No, sir."

We note this evidence, not for the purpose of indicating a violation of rules of the company, but as throwing light upon the question of appellants' negligence in the operation of the car at this point, and as indicating what might be expected from the operation of the car, by a person of ordinary prudence approaching the crossing at that time.

The evidence being sufficient to warrant the jury in believing these facts, argument seems unnecessary to demonstrate that the question of appellants' negligence was for the jury to determine. The speed of the car, the presence of the street crossing, the presence of the other car stopped at the crossing to let off and take on passengers, the delay in any attempt to check the speed of the car until it was practically upon the crossing at the side of the other car, and the delay in giving any signal of its approach until about that time, it seems to us leaves nothing to be argued upon the question of appellants' negligence, except such argument as might be properly addressed to the jury. Clearly, this branch of the case does not present a question of law for the court to decide. Indeed, the argument of learned counsel for appellants gives but little attention to their negligence,

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but is addressed almost wholly to the alleged contributory negligence of respondent, which we will now consider.

It is insisted that respondent's failure to look north along M street, where he could have observed the approaching car after he had first looked in that direction from a point about 45 feet from the track, was so plainly contributory negligence on his part that the court should decide, as a matter of law, that he is precluded from recovering damages for the injuries he received even though appellants were negligent. In the early case of *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799, this court expressed its views upon the question of contributory negligence being generally one for the jury, as follows:

"Generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury. . . .

"There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law, but we think the case in hand does not fall within either of them. The first is where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances. . . . And the second is where the facts are undisputed and but one reasonable inference can be drawn from them. . . . If different results might be honestly reached by different minds, then negligence is not a question of law, but one of fact for the jury."

And in the case of *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284, even stronger language was used as follows:

"The great weight of authority is to the effect that, before a court will be justified in taking from the jury the question of contributory negligence, the acts done must be so palpably negligent that there can be no two opinions concerning them."

This doctrine has been adhered to and variously expressed in many other decisions of this court. *Steele v. Northern*

Pac. R. Co., 21 Wash. 287, 57 Pac. 820; *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Budman v. Seattle Elec. Co.*, 61 Wash. 281, 112 Pac. 356; *Williams v. Northern Pac. R. Co.*, 63 Wash. 57, 114 Pac. 888.

It is a matter of some interest, as well as of value in this connection, to notice the reason of this, and ask ourselves why it is more rare for a case to be taken from the jury upon the ground of contributory negligence than upon the ground of want of proof of the defendant's negligence? Contributory negligence involves the consideration of affirmative proof of such negligence. It is not something that meets the plaintiff's right to recovery by a mere assertion of it on the part of a defendant. It is not a denial; but an affirmation which requires proof before it is of any effect. Hence, when a court decides, as a matter of law, that an injured plaintiff is precluded from recovering damages for his injury, because of his own negligence contributing thereto, the court is in effect deciding that facts have been affirmatively proven which conclusively show, as a matter of law, such contributory negligence. It is not easy to see why the question of plaintiff's contributory negligence should be decided by the court as a matter of law in the affirmative, under any different circumstances or required degree of proof than that the question of defendant's negligence should be decided by the court as a matter of law in the affirmative. It is true that the affirmative proof need not necessarily come from defendant's evidence. It may appear in the plaintiff's evidence. The question, nevertheless, involves an affirmative finding in order to be decided as a matter of law in defendant's favor. This is quite a different matter from withdrawing a case from the jury because of the failure of required affirmative proof to sustain a claimed right. In 1 Thompson on Negligence, § 425, that learned author observes:

“Contributory Negligence Generally a Question of Fact

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for the Jury.—As we shall see, the statement is often loosely made in judicial opinions that *negligence* is generally a question of fact for the jury; whereas, the true rule, so far as there can be any rule, is that whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances and subject to the same limitations as the question whether there has been negligence on the part of the defendant. Loose expressions, often found in judicial opinions, to the effect that contributory negligence is generally a question for a jury, are concessions to the obvious principle that whether a man, woman, or child has used, in a particular situation, the care which such persons ordinarily use, or whether they have, under the circumstances, used reasonable care, or acted reasonably, is a question which, as a general rule, is better determined by twelve men, on a comparison of their experience, than by a single legal scholar on the bench.”

At § 483 the author makes further observations of interest along this line of thought. It would indeed be a remarkable case that would call for a directed verdict against a defendant upon the ground that his negligence had been so conclusively proven as to enable the court to so decide as a matter of law; and yet there seems to be no more reason for expecting such disposition of personal injury cases occasionally against a defendant, than to expect directed verdicts against a plaintiff by reason of his contributory negligence. Both involve an affirmative showing of negligence against an equally strong presumption to the contrary. These observations suggest the exercise of great caution in deciding, as a matter of law, that a defendant is guilty of contributory negligence.

Now, in view of the facts we have summarized as occurring in this case, can the minds of reasonable men differ upon the question of the contributory negligence of respondent in proceeding towards and across the track without looking to the north, the direction from which he knew a car might come, after he had passed a point 45 feet from the track? This question cannot be determined by any hard and fast rules. The law does not fix, with any degree of exactness, the meas-

ure of respondent's duty under these circumstances. Of course, it can be said that he was required to use his senses and exercise such care as a man of ordinary prudence would be expected to exercise under such circumstances; but this, in substance, is as far as it is practicable for the law to go in defining his duty. This is not a steam railway, but a street railway in a populous residence district of the city. Hence, the rule of stop, look and listen has no application here as a rule of law defining respondent's duty, though, of course, the extent of the use of his faculties in that regard, as shown by the evidence, is a circumstance bearing upon the degree of care he exercised. In *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184, it is said:

"The degree of care required in crossing a highway and steam railway, in looking up and down the track, is not necessarily the test of care required in crossing the track of a street railway on a public street. Failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not the exclusive right of way, is not negligence as a matter of law."

In the very recent case of *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534, this rule is again recognized, and numerous other decisions of this court cited in support thereof. The evidence was sufficient to warrant the jury's believing that the appellant looked from a point 45 feet from the track, and could see only about 200 feet north along the track, and did not see any car approaching from that direction. This fact would in no event require any greater degree of care on his part than as if he had seen a car approaching 200 feet away. That is, he was warranted in governing his actions as if he saw a car approaching at that distance. He surely was not proceeding in the face of any greater hazard than that condition would suggest to him. This court has held that a pedestrian is justified in ordering his movements upon the assumption that street cars will be operated, not only in conformity with local

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laws, but with a high degree of care and with due regard for public travel upon the street. *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601; *Mallett v. Seattle, Renton & Southern R. Co.*, 66 Wash. 251, 119 Pac. 743. Respondent being entitled to act upon this assumption, it cannot be decided, as a matter of law, that he was guilty of contributory negligence in hurriedly proceeding upon his way across the track, when it was the duty of appellants, in any event, to keep the speed of the car within the limit of 20 miles per hour, and to check the speed of the car upon approaching the crossing; especially in view of the presence of the other car receiving and discharging passengers there, that point being between respondent and the approaching car and about 50 feet distant from where he intended to cross the track. Even if the car had proceeded at the extreme speed limit allowed by the ordinance, over the entire 200 feet, the jury might still conclude that it would not have reached the south crossing before respondent would have crossed over the track at that point, in view of the speed at which he was proceeding. But we have seen that respondent had a right to presume, not only that the speed of the car would in no event be over 20 miles per hour, but that its speed would be checked before reaching the north crossing, especially in view of the presence of the other car there; from all of which he might well conclude that he had ample time to cross the track at or near the south crossing before any car coming from the north could possibly reach that point, by proceeding at proper speed and observing the proper caution upon passing the north crossing and the other car there. The supreme court of Iowa in *Powers v. Des Moines City R. Co.*, 143 Iowa 427, 121 N. W. 1095, makes some observations in a case somewhat like this, which are quite appropriate here, as follows:

“The unlawful speed at which the car was being operated has a bearing upon the question of plaintiff’s contributory negligence, for he had a right to assume when he started to

cross the street, having seen the car approaching a block away, that it was running at a lawful rate of speed, and, if he could cross the track in safety before the car could reach him coming at that rate of speed, he was not chargeable with contributory negligence, unless he had become aware that it was running at a higher rate of speed. It was necessary for plaintiff to walk only about thirty feet in a diagonal direction to cross the track, and it is not contended that, had the car been approaching at a speed not exceeding eight miles an hour, he would not have been across the track and out of danger before the car reached the street crossing.

"The general claim for defendant, made in argument, is that plaintiff must have known that the car was coming at a rapid rate on account of the dust and noise to which his companions, as witnesses, testified, and that it was his duty to look out for danger before he went upon the track; but, if, as a matter of fact, plaintiff, having observed the car a block distant, proceeded to do that which would have been safe if the car was going at a lawful rate of speed, it certainly was not conclusively contributory negligence on his part that he did not stop before reaching the track to make another observation of the car, unless he was aware that the danger was greater than that which he had cause to anticipate from his first observation."

That decision is valuable as showing how the solution of the question of respondent's contributory negligence does not depend alone upon his own acts, but that such question may be largely influenced by the negligence of appellants. This is not the doctrine of comparative negligence, which seems to be repudiated by most of the courts. It simply involves the right of respondent to govern his actions in the light of such actions on the part of appellants as a reasonably prudent person in his situation would anticipate. *Kansas City-Leavenworth R. Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344.

Counsel for appellants call our attention to, and particularly rely upon, the following decisions of this court: *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458;

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Fluhart v. Seattle Elec. Co., 65 Wash. 291, 118 Pac. 51. In the *Skinner* case, the car was not running at a dangerous or unlawful rate of speed. The person injured was moving slowly and deliberately across the track, and stepped upon the track at a time when the car would have to be stopped within a distance of ten feet; that is, he stepped upon the track immediately in front of the car when it was moving towards him, and was a very short distance from him, and there did not appear to be any negligence on the part of the motorman which misled the injured person. In the *Helliesen* case, there was not involved any question of excessive speed of the car. The injured person says she looked a moment before she started across the track and saw no car coming, yet the physical facts proved positively that the car was coming and at a distance not forty feet from her. The decision seems to be upon the theory that she stepped upon the track directly in front of the car when it was close to her and when she, an instant before, had looked towards it. The *Fluhart* case may not be so easily distinguished from this one; nevertheless, we think it is distinguishable, and that it is very close to the line between questions of law and fact. It appeared in that case that respondent, when he looked in the direction from which the car was coming, could see the distance of a block, that he was then within six or seven feet of the track, moving leisurely, that he proceeded on his way, and was struck by the outer edge of the front of the car before he reached the track. Indeed, had his speed been retarded but the least bit he would have run against the car instead of the car running against him. This occurred but an instant after he said he looked in the direction from which the car came and saw no car coming. This, we think, is enough to distinguish that case from this, even though in that case the speed of the car seems to have been excessive. We are of the opinion that this cause was properly submitted to the jury, and that the question of respondent's contribu-

tory negligence could not have been decided as a question of law.

The court instructed the jury touching the doctrine of last clear chance, in substance, that although they might believe that respondent was guilty of negligence, if they should believe that the motorman in charge of the car saw respondent's dangerous position and could thereafter have prevented the accident, but failed to do so, that the verdict should be for the plaintiff, because the motorman was obliged to exercise a reasonable degree of care to prevent the accident after seeing respondent's dangerous position, although he may have been negligent in getting in the way of the car. It is not contended but that this is correct as an abstract proposition of law, but that there is no evidence justifying the giving of any such instruction. It may be conceded, for the sake of argument, that the instruction upon this subject was technically erroneous, because it appears from the evidence that the motorman did exercise all possible efforts to prevent injuring respondent after he discovered respondent's dangerous position. This instruction might be considered prejudicially erroneous if it were not for the fact that the record affirmatively shows that it was not prejudicial. Certain special interrogatories were submitted to the jury touching respondent's contributory negligence. Among others was the following interrogatory and the jury's answer thereto:

"Q. Did the plaintiff in approaching the track upon which he was struck, and in going upon same, exercise the same degree of care and diligence as would have been exercised by an ordinarily careful and prudent man having due regard for his own safety under similar circumstances and conditions? A. Yes."

This, we think, conclusively shows that the jury did not consider, and were not in the least misled by, this technically erroneous instruction. Having found that respondent was not negligent, the jury, of course, gave no consideration to the question of the circumstances under which he might have

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recovered if he had been negligent. We think the technical error in giving this instruction is affirmatively shown to be free from prejudice against appellants' rights.

The court, among others, gave the jury the following instruction:

"You are instructed that as the plaintiff approached the street car track at the point of the accident he had a right to presume that no street car would be run along such track in violation of the ordinances or laws governing the rate of speed of cars at that point; and while this presumption that the defendants would not run a car at an unlawful rate of speed, if it was so run, would not relieve the plaintiff of the obligation to exercise due care for his own safety, yet it is a circumstance which you may take into consideration in determining what is due care under such conditions, and in determining whether the plaintiff did all that an ordinary, prudent man would have done under similar circumstances to escape injury in case the law had been obeyed."

It is insisted that this instruction is prejudicially erroneous as against appellants. It is first contended that it is so because respondent did not testify that he knew that there were any ordinances or laws governing the speed of cars, nor that he relied upon the fact that a car would not exceed the speed limit. Counsel argue that the speed-limit ordinance can avail respondent nothing, because he is not shown to have been relying upon it as a matter of fact. We think, however, that it was proper for the jury to understand that respondent had a right to presume that the ordinance was not being violated and that respondent knew of the existence of the ordinance; this upon the theory that all persons are presumed to know the local laws. It has been doubted that evidence is admissible to prove that an injured person, as a matter of fact, knew of the existence of such an ordinance. *Moore v. Chicago, St. Paul & K. C. R. Co.*, 102 Iowa 595, 71 N. W. 569; *Eckhard v. St. Louis Transit Co.*, 190 Mo. 593, 89 S. W. 602. In the latter case the court said, "Deceased had a right to presume that the defendant would obey

the ordinance of the city regulating the speed of railroad trains." This was said when there was evidently no evidence in the case as to what the actual knowledge of the deceased was as to such ordinance. The decisions of this court above cited are in harmony with this view.

Some contention is made that the instruction as a whole has the effect of taking from the jury the consideration of the question of respondent's contributory negligence and permitting him to recover in any event if the speed of the car was unlawful. We think a careful reading of the instruction will not support such contention, as the court therein plainly told the jury that, while respondent was entitled to presume that defendants' car would be kept within the ordinance speed limit, yet if such limit was exceeded, respondent would not thereby be relieved of the obligation to exercise due care. Indeed, it is plain that that presumption was stated by the court to the jury only as a circumstance bearing upon the question of respondent's due care. We conclude that the instruction was not erroneous.

Other instructions requested by counsel for appellants were refused by the court, upon which error was assigned. An examination of these, however, convinces us that they were embodied in instructions which were given by the court, in so far as appellants were entitled to have them given. We do not think they call for further discussion. We are of the opinion that the evidence was such that neither the question of appellants' negligence nor of respondent's contributory negligence could be decided as a question of law, but that the cause was properly submitted to the jury upon evidence which supports the jury's findings, and that there was no prejudicial error in the giving or refusing of instructions. The judgment is affirmed.

DUNBAR, C. J., and GOSE, J., concur.

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Citations of Counsel.

[No. 9951. Department One. March 16, 1912.]

WILL BLAIR, *Respondent*, v. SEATTLE ELECTRIC COMPANY,
Appellant.¹

STREET RAILWAYS—INJURY TO HORSE AT CROSSING—TRACKS AND FROGS—GUARD RAILS—NEGLIGENCE—QUESTION FOR JURY. It cannot be said that a guard rail in street car tracks at a point opposite a frog, forming a groove that was dangerous to horses, was necessary, as a matter of law, from the fact that, in the opinion of the expert witnesses, it was necessary to protect certain frogs, where it appears that other similar frogs at the point in question, and at another street car crossing in the city, were not protected by such guard rails; and where it was so maintained that horses could not be well driven around it, negligence in its maintenance was a question for the jury.

SAME—CONTRIBUTORY NEGLIGENCE OF DRIVER—QUESTION FOR JURY. A teamster is not guilty of contributory negligence, as a matter of law, in driving a heavy team over street car frogs and switches at a crossing, from the fact that he knew that it was dangerous and that the calks of other horses had been caught in the groove between the rail and the guard rail, at the same place and at other similar situations, where it appears that the guard rail extended clear across the available space, and he made an effort to avoid passing over the rail at right angles so that there was little danger of being caught.

SAME—NEGLIGENCE—EVIDENCE—OTHER ACCIDENTS—ADMISSIBILITY. In an action to recover damages for injury to a horse by reason of its foot being caught between the rail and the guard rail in street car tracks opposite a frog, evidence of similar injuries to other horses on previous occasions at the same place, and at a similar crossing one block distant, is admissible to show the dangerous condition of the track and defendant's knowledge of it.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 2, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort, after a trial on the merits. Affirmed.

James B. Howe and *A. J. Falknor*, for appellant, contended, among other things, that a street railway company

¹Reported in 122 Pac. 358.

is not liable for injuries resulting from the maintenance of necessary and usual guards for its frogs and crossings. *Gilligan v. Boston Elev. R. Co.*, 194 Mass. 576, 80 N. E. 483; *Bobbink v. Erie R. Co.*, 75 N. J. L. 913, 69 Atl. 204; *Miller v. United R. & Elec. Co.*, 108 Md. 84, 69 Atl. 636, 17 L. R. A. (N. S.) 978; *Alcott v. Public Service Corp.*, 77 N. J. L. 110, 71 Atl. 45; *Morie v. St. Louis Transit Co.*, 116 Mo. App. 12, 91 S. W. 962. Evidence of other accidents at the same crossing was inadmissible. 17 Cyc. 284; 14 Ency. Evidence, p. 821; *Halverson v. Seattle Elec. Co.*, 35 Wash. 600, 77 Pac. 1058; *Gregory v. Detroit United R. Co.*, 138 Mich. 368, 101 N. W. 546; *Johnson v. Manhattan R. Co.*, 4 N. Y. Supp. 848; *Hudson v. C. & N. W. R. Co.*, 59 Iowa 581, 13 N. W. 735, 44 Am. Rep. 692; *Jebb v. Chicago & G. T. R. Co.*, 67 Mich. 160, 34 N. W. 538; *Wilkie v. Chehalis County Logging and Timber Co.*, 55 Wash. 324, 104 Pac. 616.

Walter L. Johnstone, for respondent.

PARKER, J.—This is an action to recover damages for injuries to a horse belonging to the plaintiff, which he alleges resulted from the negligence of the defendant in the manner of maintaining its street car tracks at the crossing of Second avenue and Pine street, in Seattle. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

Appellant maintains double track lines of street railway which cross each other at right angles at the intersection of Second avenue and Pine street, in Seattle. Curved tracks connect the crossing tracks, creating the necessity of maintaining frogs at the several points where the curved rails cross the straight rails. The relative situation of these several tracks is indicated upon the accompanying plat.

The double lines indicate the presence of guard rails inside of and near the main rails upon which the wheels of the cars run. Appellant claims that these guard rails are necessary for the purpose of more effectually keeping the cars upon the tracks while rounding curves and while crossing frogs on straight tracks. This plat was introduced in evidence by appellant, and appears to be drawn with great care for the purpose of representing the exact relative location of the rails and frogs at the place where the injury to the horse occurred. The numbers 1 to 8 inclusive are our own. We have inserted these for the purpose of convenient reference to the several points indicated which we will have occasion to notice later. We may, for the purpose of our

discussion, consider the top of the plat as being north, though it is not exactly so.

On June 6th, 1910, a heavy team of horses belonging to respondent was driven by one of his teamsters west along the north side of Pine street across Second avenue. When the front feet of the horses reached the guard rail numbered one on the plat, one of the horses stepped upon the rail so that the toe calk of one of its front shoes dropped into the space between the main rail and the guard rail and caught there, when the horse attempted to withdraw it. The horse became frightened, and in its effort to free its foot, broke its leg, resulting in such serious injury that it became necessary to shoot the horse. The space between the north track on Pine street and the north sidewalk curb, along which the team was being driven, is not over 17 feet wide. The guard rail where the horse got its foot caught was about twenty feet long, and as will be noticed by its position upon the plat, extended practically clear across this seventeen foot space, so that it could not be avoided by the driver, except to pass around the north end of it on Second avenue, going clear off of Pine street, or by passing around the south end of it over the street car tracks running along Pine street. It is clear that either of these alternatives would be rather an unusual course for a driver to pursue unless there was some special reason therefor. The calk of the horse's shoe which caught between the rails was about three inches long, one inch deep, and three-fourths of an inch thick. It is not shown, nor is there any claim made, that this calk is materially different from that in common use upon heavy horses upon the city streets. The groove between the guard and main rail is about one and one-half inches wide, and about the same in depth; so the calk was evidently caught by reason of the manner in which a horse lifts its feet in walking, rather than because the calk tightly fitted in the groove. Other facts will be noticed in our discussion of counsel's contentions.

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Counsel for appellant first contend that their motion for an instructed verdict in appellant's favor was erroneously overruled: (1) Because of want of evidence of appellant's negligence sufficient to support a verdict against it; and (2) because of contributory negligence on the part of respondent's teamster. We will notice these in this order. It is argued in behalf of appellant that the guard rail where the horse's shoe was caught was a necessary appliance incident to a proper operation of its cars, because of the presence of the two frogs shown at numbers 2 and 3 on the plat, and that therefore appellant had a right to maintain the guard rail opposite those frogs even though such guard rail may have created a condition which was dangerous to horses passing over it.

Street car companies may have the right to construct necessary appliances on the surface of the street in connection with their tracks which, in some degree, may render the street somewhat less safe than it would be in the entire absence of street car tracks. Yet, no doubt, there is a limit beyond which street car companies may not go in constructing such appliances as increase the danger to team travel, no matter how necessary such appliances may be to the proper operation of their cars. However, we do not find it necessary to deal with this problem, since we are of the opinion that the evidence warranted the jury in finding against appellant upon the question of the necessity of the presence of this guard rail on the street surface, and the question of the danger it presented to horses passing over it.

There was evidence introduced tending strongly to show that this guard rail, and others similarly situated on straight tracks where teamsters have occasion to drive across them at right angles, are prolific of accidents and injuries to horses more or less of the same nature as the injury here involved. For some reason the guard rails on the curves do not seem to produce such results. This may be because the grooves are wider and have more sloping sides. It seems

quite clear to us that the evidence warrants the conclusion that this guard rail and others similarly situated are dangerous to horses passing over them, and that appellant was negligent in maintaining this guard rail, unless it is excused because of the necessity of so maintaining it.

The necessity for guard rails on the opposite side of the track from frogs, it is insisted, arises because when a car is running against the point of the frog, if the flanges of the wheels on that side of the car are not held away from the frog, they are apt to strike the point of the frog causing the car to leave the track; and that the guard rail on the opposite side of the track results in holding the flanges of the wheels away from the point of the frog, thus insuring the passing over the frog in safety. The question of the necessity of having this guard rail there is necessarily a question of fact for the jury to determine, unless we can say that the evidence leaves no room for honest differences of opinion relative thereto. It is true, we have here the testimony of appellant's witnesses, who are experienced, as to the necessity of guard rails in places of this nature. This is, in effect, opinion evidence and it is not contradicted by other opinion evidence. We think, however, there are facts in the case which might warrant the jury in believing that this guard rail was not necessary at this place. Let us notice some things shown by this record which might induce the jury to so believe. Upon the plat there will be noticed frogs at numbers 4, 5, 6, 7 and 8, which are not materially different from the frogs at numbers 2 and 3, though their angles are not quite so sharp; yet they are not accompanied by any guard rails on the opposite side of the track. There was also evidence that at another street crossing where the tracks are in similar condition as here, there were no guard rails upon the straight tracks. This particular crossing is within one block of what the evidence indicates is the busiest street crossing in the city of Seattle. So it would seem clear that it is not a place where cars would have occasion

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to maintain other than a very moderate rate of speed. In view of these facts, it seems to us we cannot say, as a matter of law, that the guard rail was necessary at this point. It is clear from the record that the jury found against appellant upon the ground of the want of necessity for maintaining this guard rail at the place of the accident, as well as upon the ground that it was plainly dangerous to horses passing over it. This sustains the verdict so far as appellant's negligence is concerned.

Was respondent's teamster guilty of contributory negligence? It appears from the evidence that the teamster knew of other horses being caught and injured in a similar manner on previous occasions at this and other similarly situated guard rails. This is the principal basis of appellant's contention that the teamster was negligent in driving the team across the guard rail, he knowing the danger there. From the teamster's testimony, it appears that he turned the horses and drove somewhat diagonally across the rail for the purpose of avoiding the catching of the horses' shoes in the groove. There were, however, some conditions there that prevented him from deviating from a straight course as much as he desired. It appears that when horses are driven diagonally across such a guard rail as this, there is little danger of their shoes being caught in the groove. In view of the fact that this guard extended practically clear across the 17 foot space between the north track and curb line along which teams would ordinarily be driven in that direction, and of the teamster's effort to avoid passing over the guard rail at right angles, we think it was for the jury to say whether or not he was negligent in the course he pursued. We think reasonable minds might differ on this question, hence, it is not one of law for the courts to decide. *Richmond v. Tacoma R. & Power Co.*, ante p. 444, 122 Pac. 351.

It is contended that the court erroneously received evidence of injuries resulting to other horses by having their shoes

caught at this place on previous occasions. This evidence was offered and received evidently upon the theory that it showed the dangerous condition existing there, and also as tending to show appellant's knowledge of such condition. The decisions do not seem to be in entire harmony upon this question, but we think the better rule is in favor of the admissibility of such evidence.

In the case of *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933, dealing with a question quite similar to this, the court observes, at page 695:

"One of the facts it was necessary to establish in this action was the condition of the sidewalk. Before the plaintiff could recover, she must prove that it was unsafe to walk over. Of course this could be proven in different ways, and by other evidence than that of other accidents. It is conceded that this is not the most direct and positive evidence of which the case is susceptible; but the simple fact that there were frequent accidents on this part of the sidewalk would tend to show that it was unsafe. When the question of the proper condition or safety of anything constructed is to be determined, evidence tending to show that it served the purpose for which it was designed is always competent, and often the most satisfactory and conclusive in its character. On the other hand, evidence to show that frequent and repeated accidents resulted from its use, would be testimony tending to show that it was not properly constructed. This walk had been tested by actual use, and this evidence tended to show that it was dangerous and unsafe.

"It is objected that the testimony presented new issues which the defendant had not expected, and could not be prepared to meet. In a limited sense every item of evidence material to the main issue presents a new issue in this respect, at least: it invites, by way of reply, a contradiction or an explanation. In no other way did the evidence make a new issue. It was important, as we have said, to show that the sidewalk was unsafe and dangerous, and upon that question the defendant was required to be prepared. . . .

"It is further contended that the evidence of other accidents admitted in this action should have been excluded, for the reason that it was not proven that the other persons

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falling on the walk fell over the same plank that the plaintiff did. The evidence shows that only one of them fell at the same or near the same place where she did. It is established, however, that all fell on the sidewalk built of oak plank taken from the bridge. If it had been constructed of pine plank, as required by city ordinance, and secured and fastened down properly, and kept in reasonably good repair generally, the contention of defendant would probably be correct; but the plaintiff's complaint of the sidewalk is that it was not built of suitable material, was not thoroughly nailed down to the stringers in the first place, and had not been kept in even as good condition as it was when constructed. These accidents happening where they did would tend to prove that that part of the sidewalk was poorly built out of unsuitable material, and would be some evidence tending to show a defect in the precise spot where the plaintiff received her injuries."

See, also, *Lombar v. East Tawas*, 86 Mich. 14, 48 N. W. 947; *District of Columbia v. Armes*, 107 U. S. 519; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674; *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102. In the last cited case, evidence was received not only showing accidents happening upon the same cogwheels involved, but upon others similarly situated. We think the admission of this evidence was not erroneous.

It is further contended on behalf of appellant that the trial court erred in admitting evidence of similar accidents at Second avenue and Pike street, that being one block distant from the place of this accident. The conditions of the tracks at the Pike street crossing appear to be substantially the same as to their relative location. The grooves between the guard rails and main rails on the straight tracks, however, apparently are not exactly the same as at the crossing here involved. The grooves are somewhat wider and somewhat deeper. The tracks are considerably older and for that reason probably more worn. This was all before the jury, and we are constrained to view this objection as going more to the weight of the evidence than to its relevancy. It did tend

to show, at least in some slight degree, how the shoes of horses may get caught in grooves between the guard and main rails on straight tracks wherever they are so situated that the course of team travel is directly across them at right angles. We do not think the evidence was prejudicially erroneous, even though the groove between the rails does appear to be slightly different from that here involved.

We are of the opinion that the record shows no prejudicial error against appellant. The judgment is affirmed.

CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10064. Department One. March 16, 1912.]

STEPHEN A. GIBSON, *Cross-Appellant*, v. MARIE M. T. GIBSON, *Appellant*, MONTANA SCOTCH BONNET COPPER & GOLD MINING COMPANY, *Respondent*.¹

APPEAL—REVIEW—FINDINGS—CONSTRUCTION. Where the evidence is brought up on appeal, the findings will not be given a technical construction, but the case will be considered on its merits.

DIVORCE—GROUNDS—CRUELTY—EVIDENCE—SUFFICIENCY. A divorce on the ground of cruelty on the part of the wife is justified where it appears that she refused to cohabit with the plaintiff, was guilty of fraud and deceit in securing a marriage without intent to cohabit, and brought an unfounded charge of adultery against him.

DIVORCE—DIVISION OF PROPERTY—SUIT MONEY—ALLOWANCES—SUFFICIENCY. Upon granting a divorce on the ground of cruelty on the part of the wife, who secured the marriage by deceit, allowances to the wife of \$600 alimony, \$125 suit money, and \$750 attorney's fees and costs, is an ample provision, where there was no community property and the husband, a retired farmer in comfortable circumstances, had already given her \$1,000.

DIVORCE—ALLOWANCE—ATTORNEY'S FEES. On motion for a new trial in a divorce case, the court has jurisdiction to reopen the case and modify the decree by requiring payment of costs and a further allowance for attorney's fees.

¹Reported in 122 Pac. 15.

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SAME—ATTORNEY'S FEES. The allowance of attorney's fees to the wife in a divorce case is within the sound discretion of the trial court; and no abuse is shown by the allowance of \$500 additional, upon denying a motion for a new trial, the preliminary allowance having been \$250.

Cross-appeals from a judgment of the superior court for Spokane county, Carey, J., entered March 15, 1911, upon findings favorable to the plaintiff, but awarding costs to defendant, in consolidated actions for a divorce and to recover mining stock. Affirmed.

Belt & Powell and *Scott & Campbell*, for appellant.

R. L. Edmiston and *A. L. Craven*, for cross-appellant.

GOSE, J.—This is a suit for divorce, consolidated with an action for the recovery of certain certificates of mining stock issued by the defendant corporation. There was a decree for the plaintiff in both actions. The defendant Marie T. Gibson has appealed, and the plaintiff, hereafter called cross-appellant, has taken a cross-appeal from that part of the decree awarding costs and attorney's fees to the defendant Mrs. Gibson. The appeal of Mrs. Gibson, hereafter called the appellant, will be first considered.

The court found that the appellant has subjected the cross-appellant to cruel and inhuman treatment, rendering his life burdensome, and that it is impossible for them to longer live together as husband and wife. It further found that the charge of adultery made by the appellant against the cross-appellant in her cross-complaint is untrue. The appellant's first contention is that the finding of cruelty is not sufficiently broad to support the decree of divorce. It suffices to say that the ultimate fact of cruelty is found. While we adhere to the rule announced in *Bloom v. Bloom*, 57 Wash. 23, 106 Pac. 197, 135 Am. St. 965, that it is better practice to have "full and explicit" findings, we will not give the findings a technical construction where the evidence is before us, but will consider the case on its merits.

The appellant next contends that the evidence does not support the decree. We need say but little on this question. The marriage occurred December 29, 1909, at the home of the cross-appellant, in the city of Spokane. He left his home about July 1, 1910, and filed his bill for divorce about September 1 following. Between these dates, there was no reconciliation. The appellant prior to the marriage was living in Tacoma. About three weeks after the marriage, she returned to Tacoma, where she remained from three to five weeks; then returned to Spokane, where she remained until April 12, when she again went to Tacoma, and did not return to Spokane until June 14. It is conceded that there was no cohabitation. The appellant justifies her action on the ground of ill health, and claims that there was an antenuptial agreement that there should be no cohabitation for six months after the marriage. This is denied by the cross-appellant. In the marriage certificate, the appellant represents her age to be thirty years, and the cross-appellant represents his age to be sixty years. The finding of cruelty is fully warranted by the evidence. It would be a mockery to speak of the relation as a marriage. It was a marriage in name only. The substance was entirely wanting. It is apparent from all the testimony that the appellant had no love or affection for the cross-appellant. The marriage on her part was a sham and a pretense, and her entire course of conduct towards the husband was one of fraud and deceit. The court found that her charge of adultery against her husband had no foundation in fact. This was equivalent to a finding of cruelty against him. The other evidence of cruelty need not be pointed out. It suffices to say that there is an abundance of such evidence.

It is argued that the appellant should have been awarded a portion of the property. On the property question, the court found that there is no community property, which is conceded, and that the appellant obtained the certificates of mining stock through false representations. The decree dis-

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solved the marriage relation at the suit of the cross-appellant, directed that the appellant take nothing under her cross-complaint, required her to indorse and deliver the stock certificates to the cross-appellant, and decreed that she has no interest in any of the property. Pending the action, pursuant to an order of the court, the cross-appellant paid the appellant \$600 alimony, \$125 suit money, and \$250 attorney's fees. In denying the motion for a new trial, the court gave the appellant judgment for her costs and for additional counsel fees of \$500. In addition to these items, the cross-appellant gave her money for her personal expenses, including debts which she incurred, amounting to about \$1,000. The husband is a retired farmer in comfortable circumstances and about sixty-three years of age. To require him to pay her more than he has already paid would be a rank injustice. She has already garnered enough from his estate.

We will now consider the cross-appeal. The findings of fact, decree, and motion for a new trial were each filed with the clerk on March 15. The decree provides that neither party recover costs, and that the appellant recover no attorney's fees. The motion for a new trial was overruled, but the order overruling the motion modified the original decree to the extent that it required the cross-appellant to pay the appellant's costs and an additional attorney's fee of \$500. The court had jurisdiction, in passing on the motion for a new trial, to reopen the case for further testimony, or to modify the decree. He chose the latter course. Rem. & Bal. Code, §§ 368, 398, 402. Section 398 is as follows: "A new trial is a reexamination of an issue [of fact] in the same court after a trial and decision by a jury, court, or referees." The allowance of costs and reasonable attorney's fees in favor of the wife in divorce cases, without regard to whether she is the prevailing party, is a matter within the sound discretion of the trial court; and its rulings in that respect, unless an abuse of discretion is clearly shown, will not be

interfered with on appeal. *Van Gelder v. Van Gelder*, 61 Wash. 146, 112 Pac. 86. This is an assumed risk which the husband takes with him from the marriage altar, and which follows him until death or divorce squares the debt. Rem. & Bal. Code, § 988. The record shows no abuse of discretion on this question.

The cross-appellant has cited authorities which hold that, after a motion for a new trial has been overruled, a further application for a new trial or modification of the judgment cannot be heard. This is undoubtedly the correct rule. He cites upon this question *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363, and other cases. *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. 982, announces the same rule. These cases, however, have no application. The judgment is affirmed as to both parties. Neither party will recover costs on appeal.

PARKER, CROW, and CHADWICK, JJ., concur.

[No. 10040. Department One. March 16, 1912.]

DUDLEY H. ROCKWELL, *Appellant*, v. EILER'S MUSIC HOUSE,
Respondent.¹

LANDLORD AND TENANT—LEASE—PURPOSE. In the absence of any restrictions in a lease, the premises may be used for any lawful purpose.

EVIDENCE—PAROL—VARYING LEASE. Where a lease, complete in itself, requires the tenant to make any desired alterations, it cannot be varied by evidence of an oral contemporaneous agreement that the landlord should make certain alterations and improvements.

LANDLORD AND TENANT—LEASE—BREACH — REPAIRS — RIGHTS OF TENANT—RECOVERY OF RENT PAID—USE OF PREMISES. A tenant who leased part of a building intending to use the same as a theater, cannot recover damages for breach of the lease in that the landlord, "did not disclose" that the building could not, under the ordinances

¹Reported in 122 Pac. 12.

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of the city, be used for that purpose until an exit had been constructed, where the lease provided that the tenant should, at his own expense, make all changes and improvements in the building, and it was not alleged that the landlord refused to permit him to construct the exit, and did not mislead him as to the ordinances; since one contracting in a city with reference to matters governed by police regulations is charged with notice of the ordinances.

LANDLORD AND TENANT—LEASE—SURRENDER—ACCRUED RENT. On the termination of the relation of landlord and tenant, the right to accrued rent is fixed by the terms of the lease, whether the termination was by reentry or surrender, and whether the rent was payable in advance for a period beyond the time of the surrender, or already paid up in advance.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 3, 1911, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

Stallcup & Keyes, for appellant.

Walter M. Harvey, for respondent.

Gose, J.—This is an appeal from a judgment entered in favor of the defendant, after a demurrer had been sustained to the complaint and the plaintiff had declined to plead further. The appellant predicates his cause of action upon a lease which bears date July 7, 1910. The lease provides:

“That said party of the first part [the respondent] does by these presents lease and demise unto the said party of the second part [the appellant] that part of the second and third floors commonly known as the Temple of Music, situate and being in that building described as 843-845, C street, Tacoma, Washington, and room number one (1) on the second floor, with the appurtenances, for the term of five (5) years, from the 1st day of August, one thousand nine hundred and ten, for the sum of twelve thousand dollars (\$12,000), payable in gold coin of the United States of America, as follows, to wit: The sum of one hundred and sixty-five dollars (\$165) per month for the first year; one hundred and ninety dollars (\$190) per month for the second year, and two hundred and fifteen dollars (\$215) per month for the third, fourth and fifth years, as follows, to wit: The sum of three hundred and

eighty dollars (\$380) at the time of the signing of this lease, being payment for the first and last month's rent, the receipt whereof is hereby acknowledged, and the rent thereafter shall be paid on the 1st of each and every month thereafter in advance during the said term of this lease;"

The lease further provides that the respondent may re-enter the premises and remove all persons therefrom in case of a default in the payment of rent, or if default shall be made in any of the covenants of the lease, and obligates the appellant to pay the rent in the manner stipulated. It further provides that the respondent shall pay for light used by the appellant, and for the power to run the organ in the building; that all improvements and changes made by the appellant shall be at his expense; that they shall conform to the insurance laws and ordinances of the city; that they shall become a part of the building and remain therein after the expiration of the lease, and that if they increase the cost of the insurance on the building, the excess shall be borne by the appellant. The complaint is of too great length to be set forth *in extenso*. It alleges, in substance, that the appellant, with the knowledge of the respondent, leased the premises for the purpose of carrying on a moving picture show; that the premises, prior to and at the time of the letting, were used for public shows and entertainments, and were equipped with chairs and seats for that purpose; that the appellant did not know that the premises could not be used for the contemplated purpose; that the respondent "did not disclose" to the appellant that the premises could not "be any longer used for such purposes," or for the use of audiences for any purpose, "until an exit for escape in case of fire" should be constructed extending over a part of the building not included in the lease; that it was agreed that the appellant should make certain alterations and permanent improvements, "the same being considered, taken, and accepted as part payment in the rental charge of said premises, so that the cash rate of the monthly rental was proportionately re-

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duced as stated in the lease in consideration of the same;" that the appellant entered into the possession of the premises and completed the improvements on the 30th day of September; that the chief of the fire department of the city then notified the appellant that the premises could not be used for moving picture shows until an exit was constructed in conformity with the city ordinance; that the respondent refused to construct the exit; that the appellant, on October 15, opened the show and was arrested by the city authorities; that on the 25th day of October, the respondent refusing to construct an exit, the appellant "then and there surrendered such leasehold estate and the keys thereof" to the respondent, and that it has since had the possession and control of the premises. It is further alleged:

"That thereafter, and on or about the 4th day of November, 1910, the said defendant commenced an action against this plaintiff upon said lease contract for the sum of one hundred and sixty-five dollars (\$165) for the rent for the month of October, 1910. That thereafter, while said action was still pending, the said defendant agreed to and did terminate the said lease, and accepted the said surrender theretofore made of the same, . . ."

The appellant seeks to recover upon three causes of action. The first cause of action is for the recovery of \$215 paid as rental at the time of the execution of the lease for the rent of the last month of the term. The second cause of action is for the recovery of the rent paid for the months of July, August, and September, 1910. The third cause of action is for the recovery of the amount paid by the appellant for repairs and improvements on the building, upon the allegation that the improvements are of a "lasting and beneficial" character. The three causes of action are so intimately associated that we will consider them together.

There being no restrictions in the lease as to the purposes for which the premises may be used, the appellant was at liberty to use them for all lawful purposes. *Hayton v. Se-*

attle Brewing & Malting Co., 66 Wash. 248, 119 Pac. 739. The lease is complete in itself, and its terms cannot be changed by a contemporaneous parol agreement. *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11. The appellant cannot recover under the terms of the lease by the matter pleaded. The allegation is that he had no knowledge of the ordinance requiring the construction of an exit as a prerequisite to the use of the building for a moving picture show, and that the respondent "did not disclose" that fact to him. This is true for two reasons, (1) the lease does not limit the use of the building, and (2) the city ordinances operate with all the force of a statute within the limits of the municipality, and all persons "within the corporate territory are bound to take notice of their provisions" when duly enacted and promulgated, and to obey them. 28 Cyc. 291-2. All persons who contract within the limits of a municipality in reference to matters which are governed by police regulations are charged with knowledge of their provisions. *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 7 South. 360, 18 Am. St. 105; *Central R. & Banking Co. v. Brunswick & W. R. Co.*, 87 Ga. 386, 13 S. E. 520; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406; *Palmyra v. Morton*, 25 Mo. 593; *Buffalo v. Webster*, 10 Wend. 100.

It is not important whether the matter set forth in the complaint be treated as a reentry and termination of the lease for the nonpayment of rent, or a surrender. In either case, there was a termination of the relation of landlord and tenant, and the right of the landlord to accrued rent was fixed and determined by the terms of the lease.

"A surrender has no effect upon the liability of the tenant for rents accrued at the time of the surrender. And this is true though the rent was payable in advance for a period beyond the time of the surrender, and *a fortiori* rent paid in advance cannot be recovered on surrender." 18 Am. & Eng. Ency. Law (2d ed.), 295.

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The same rule is well stated in *American Bonding Co. v. Pueblo Inv. Co.*, 150 Fed. 17, as follows:

"The termination of a lease during its term by surrender, by reentry, or by eviction, without more, discharges the lessee from liability for rents that have not accrued, but leaves him liable for all the rents which have accrued and become due, and for the performance of all covenants whose fulfillment is due."

See, also, *Cameron v. Little*, 62 Me. 550; *Learned v. Ryder*, 61 Barb. 552; *Sperry v. Miller*, 16 N. Y. 407.

Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973, is an instructive case upon all the questions under consideration, and is directly in point. In that case it was held that a lessor of a building, used by the lessee as a theater, who has not covenanted to make repairs, does not breach the lease by failing to furnish additional means of egress ordered by the inspector of public buildings, for want of which the lessee's license to carry on theatrical performances was suspended. In that case, as in the case at bar, it was alleged that the order requiring additional means of egress could not be complied with within the portion of the building demised to the defendant. In addressing itself to that question, the court observed that there was no averment that, upon request, the landlord refused to assent to such repairs being made by the lessee, so far as they were necessary to comply with the order. Nor is there such an allegation in the complaint in the case at bar. The averment here is that the respondent refused to provide the means of egress. It is not necessary to consider what the appellant's rights would be if, upon request, the respondent had refused him permission to construct an exit upon the walls of the unleased portion of the premises. Nor is it necessary to consider whether such right was implied from the terms of the lease and the facts pleaded.

Rosenbaum v. United States Credit System Co., 64 N. J. L. 34, 44 Atl. 966, cited by the appellant, is not in point.

The decision in that case is based upon the principle that a mistake in regard to the law of another state is a mistake of fact, and it was held that, where an employer, with knowledge of the laws of a sister state, engages an employee who has no knowledge of the laws of that state to enter into a contract for service to be rendered therein forbidden by the laws of that state, the employer is liable for damages upon the ground of fraud. It is scarcely necessary to say that the case is not in point. Nor are the authorities upon the question of a failure of consideration pertinent to the facts pleaded.

In conclusion, it suffices to say, that the use of the premises was not limited by the terms of the lease; that the lease is complete in itself; that the respondent did not engage to make any repairs or improvements upon the premises; that the appellant did engage to make certain improvements; that both parties were bound to take notice of the police regulations of the city where the subject-matter of the contract was situated; that there is no averment that the respondent misled the appellant, or that it refused to permit him to construct the exit upon the wall of the building without the terms of the lease; that upon the cancellation or surrender of the lease, the appellant was obligated to pay all rent that had accrued by the terms of the lease, and that the complaint, when read with the lease, shows no breach of any of its terms or of any legal duty upon the part of the respondent.

The judgment is therefore affirmed.

CHADWICK, PARKER, and CROW, JJ., concur.

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Opinion Per MORRIS, J.

[No. 10121. Department Two. March 18, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. THOMAS ATON,
Appellant.¹

RAPE—EVIDENCE—CORROBORATION—NECESSITY—AGE AND PLACE—INSTRUCTIONS. An instruction in a prosecution for rape that corroboration of the prosecutrix is sufficient if the testimony in any material matter tends to connect the defendant with the commission of the offense, is not objectionable as making it sufficient if she was corroborated as to her age.

CRIMINAL LAW—APPEAL—INSTRUCTIONS — REQUESTS — HARMLESS ERROR. Error cannot be predicated upon an instruction as to the effect of a prior act of intercourse upon the credibility of the prosecuting witness in that it did not state the effect upon the girl's consent to the act complained of, where no request was made therefor, and the instruction given was favorable to the defendant.

Appeal from a judgment of the superior court for King county, Gay, J., entered September 30, 1911, upon a trial and conviction of rape. Affirmed.

Burkey, O'Brien & Burkey and *Reynolds, Ballinger & Hutson*, for appellant.

John F. Murphy, Crawford E. White, and Reah M. Whitehead, for respondent.

MORRIS, J.—Defendant, having been convicted of the crime of rape upon a female child of the age of sixteen years, appeals.

The assignment of error first urged is that the evidence is insufficient to establish the necessary element of force. We do not care to recite the testimony upon this feature. It was sufficient, if believed by the jury, to support a finding that the act complained of was against the will of the prosecuting witness, and that her resistance was overcome by force. The instructions of the court upon this point were full and complete, and there could be no doubt in the minds

¹Reported in 121 Pac. 980.

of the jurors as to the character of the force and resistance necessary to establish the crime complained of.

Complaint is next made of an instruction defining corroborating evidence, and of the failure of the court to give an instruction upon this point requested by the defendant. The requested instruction correctly defined the law. The court, however, preferred its own language to that of counsel for defendant, and gave its own instruction. We find no fault in it. Appellant's criticism is based upon this included sentence, "it is sufficient if the testimony in any material matter tends to connect the defendant with the commission of the offense." The argument is that the jury could have found corroborating evidence of the girl's age, or that the offense took place in King county, which, under the language complained of, would have been sufficient. It is a sufficient answer to this contention to say that evidence as to the girl's age, or the place where the offense was committed, would not tend to connect the defendant with the act complained of, which was what the court told the jury. The instruction plainly and clearly instructed the jury that the corroborating evidence must go to the commission of the act itself by the defendant. It could have been understood in no other sense. The girl had testified to a prior act of intercourse with a boy acquaintance. The jury were told this fact, if believed, might be considered by them as affecting her credibility. Appellant contends the court should have said "consent" instead of "credibility." No request was made to the court for an instruction as to the effect of a prior act of intercourse upon the girl's consent to the act complained of. It, therefore, cannot be held error that no such instruction was given. *State v. Douette*, 31 Wash. 6, 71 Pac. 556; *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490; *State v. Parsons*, 44 Wash. 299, 87 Pac. 349, 120 Am. St. 1003. We do not feel called upon to consider whether the instruction given was good or bad. All that need be said is, if the instruction was bad, it was in defendant's favor, since there

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was no question but that the girl had previously indulged in this prior act and any doubt thrown upon her credibility would be in defendant's favor, and he cannot be heard to say it was such a prejudicial error as to entitle him to a new trial.

Finding no error in the case, the judgment is affirmed.

FULLERTON, MOUNT, and ELLIS, JJ., concur.

[No. 10079. Department Two. March 18, 1912.]

MARIE HARDER *et al.*, *Appellants*, v. ALDRIDGE A. MATTHEWS,
Respondent.¹

MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A pedestrian hurrying diagonally across a busy street to catch a street car on the opposite side of the street, is guilty of contributory negligence, as a matter of law, preventing recovery for damages from being struck by an automobile going in the opposite direction, where it appears that she left the curb 150 feet from the crossing, near a standing express wagon which obstructed her view of approaching vehicles, that she walked from behind the express wagon and stepped in front of the approaching automobile without seeing it, and the driver did not see her until she was struck, notwithstanding that the automobile was being driven at the rate of 25 miles an hour.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 14, 1911, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for injuries sustained in a collision with an automobile. Affirmed.

Laughon, Lavin & Fitzgerald, for appellants.

Graves, Kizer & Graves, for respondent.

MOUNT, J.—Action for personal injuries. The trial court, at the close of the evidence for the plaintiff, directed a ver-

¹Reported in 121 Pac. 983.

dict for the defendant, upon the ground that the plaintiff Marie Harder was guilty of contributory negligence on account of which she was injured. The action was therefore dismissed. Plaintiffs have appealed.

Mrs. Harder was struck by an automobile which was being driven by the defendant. Just prior to her injury, she was walking along the sidewalk upon the north side of Sprague avenue, in the city of Spokane. This avenue runs east and west. It is intersected at right angles by Madison street to the west, and by Monroe street to the east. The distance between Madison and Monroe streets is about 600 feet on Sprague avenue. Mrs. Harder, on the evening of January 28, 1911, was walking east, on the sidewalk on the north side of Sprague avenue. When she reached about the middle of the block between Madison and Monroe streets, she looked back and saw a street car coming east on Sprague avenue. The car stopped on the east side of Madison street. She desired to get on the car. She knew it would stop on the east side of Monroe street to take passengers there, and she knew that she would have to hurry to reach the south side of Sprague avenue and the east side of Monroe street in order to catch the car. She attempted to cross Sprague avenue in a diagonal or southeasterly direction from a point about 150 feet west from Monroe street. Sprague avenue at that time, the witnesses say, "was a busy street;" meaning that there were a number of vehicles of different kinds passing in each direction upon the street. The city ordinance required vehicles traveling west upon that street to keep to the north side of the street, while those traveling east were required to keep on the south side. When Mrs. Harder started to cross the street, she says she looked east and saw no vehicles coming. An express wagon was standing near the sidewalk curb on the north side. This express wagon was a short distance away from her. Boxes and trunks were being loaded upon it, and it obstructed her view of the street beyond to the eastward. When she came within a short distance of the

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express wagon, somewhere between seven and twelve feet, she started diagonally across the street, looking toward the street car. At that time, the defendant was driving west in his automobile along Sprague avenue. He ran within two or three feet of the express wagon, the witnesses say, at about the rate of twenty-five miles per hour. Mrs. Harder did not see the automobile, and the defendant did not see Mrs. Harder until after the accident. The result was that Mrs. Harder was struck by the auto upon her right knee, and was injured.

It is apparent that Mrs. Harder was guilty of negligence which caused her injury. She was attempting to cross a busy street at a place where pedestrians were not supposed to cross. She was looking in a direction nearly opposite to the direction she was going. She walked no doubt rapidly, for she was hurrying to catch a car. She emerged from behind an express wagon into the path of vehicles, without looking for approaching vehicles. Her negligence is manifest. She no doubt had a right to cross the street at any place she chose, but when she attempted to cross at a point other than one provided for pedestrians she was required to use greater care than when she crossed at a point provided for pedestrians, and where drivers of vehicles are required to be on the look out for pedestrians. For a much stronger reason, when she walked out from behind the express wagon where she could not see approaching vehicles, and where drivers thereof could not see her, and where she knew that vehicles were likely to approach, it was her plain duty, in the exercise of ordinary care in emerging therefrom, to look in the direction she was going. If she had done this, she would have seen the defendant and no doubt have avoided the injury. Her own negligence prevents her recovery, even though the auto was being driven at the rate of twenty-five miles per hour, as the plaintiffs endeavored to prove by evidence which is far from satisfactory. This rule is well es-

tablished. *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51, and cases there cited.

The judgment is affirmed.

MORRIS and ELLIS, JJ., concur.

[No. 9722. Department One. March 18, 1912.]

CHARLES BRUHN *et al.*, Respondents, v. PASCO LAND
COMPANY *et al.*, Appellants.¹

JUDGMENT—DEFAULT JUDGMENTS—VACATION — LIMITATIONS — RECOVERY OF REAL PROPERTY—STATUTES—CONSTRUCTION. In view of Rem. & Bal. Code, § 705, providing that any person having a valid interest in real property and a right to the possession thereof may recover the same by action in the proper county, and may have judgment in such action quieting or removing a cloud from the title, and § 809, authorizing an action to quiet title without including specific relief for the recovery of possession, the provision of § 806, authorizing the vacation of a default judgment in actions to recover possession of real property, where service was by publication, at any time within two years after entry of judgment, has no application to a judgment in an action to quiet title to vacant and unoccupied land the title to which was alleged to be in the plaintiffs, the complaint not seeking recovery of possession, but only the adjudication of adverse claims made by the defendants; since actions to quiet title and to recover possession are not essentially the same under our statutes.

SAME—VACATION FOR FRAUD—LIMITATIONS. A petition to vacate a judgment for fraud, under Rem. & Bal. Code, § 464, where there was no personal service on the defendant, under Id., § 235, is limited to one year after entry of the judgment, and cannot be entertained after that time, although an independent suit in equity to vacate for fraud might be maintained after the expiration of two years.

Appeal from an order of the superior court for Franklin county, Pendergast, J., entered April 25, 1911, refusing to vacate a default judgment, upon sustaining a demurrer to the petition. Affirmed.

¹Reported in 121 Pac. 981.

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Horrigan, Coad, Driscoll & Leonard and C. M. O'Brien,
for appellants.

Engelhart & Rigg (Paul Holbrook, of counsel), for respondents.

FULLERTON, J.—On April 10, 1907, Charles Bruhn and Pauline Bruhn, his wife, began an action against C. E. Mayne and Zilla Mayne, and others, to quiet title to certain real property, situated in Franklin county. In the complaint, the plaintiffs alleged that they were the owners in fee of the property described, and that the defendants claimed an estate or interest therein adverse to the plaintiffs, which claims were without right or validity and constituted a cloud upon the title of the plaintiffs. In the prayer for relief, they asked that the defendants be required to set forth the nature of their claims to the property, that these claims be adjudged and decreed to be without validity, that the title of the plaintiffs be quieted, that the defendants be forever enjoined and debarred from asserting any claim to the property described adverse to the plaintiffs, and that the plaintiffs have such other and further relief as to the court should seem meet and equitable.

The defendants Mayne and wife were without the jurisdiction of the court, and service of summons upon them was made by publication. The defendants did not appear in the action, and on November 5, 1907, a judgment and decree was entered against them in accordance with the prayer of the complaint. The complaint was silent concerning the possession of the property, but it was recited in the decree that the property was vacant and unoccupied.

On August 18, 1909, more than one year after the judgment had been entered, but less than two years thereafter, the present appellants, William Loewi and Josephine Loewi, as the successors in interest of C. E. Mayne and wife, petitioned the superior court of Franklin county to vacate the decree, to substitute the petitioners as parties defendant in

the place of Mayne and wife, and allow them to appear and defend the action. The petition set forth facts sufficient to constitute a defense to the action, and facts tending to excuse the failure of their predecessors in interest to appear and defend in the original action within the sixty-day period limited by the statutes.

To the petition, the plaintiffs demurred on the ground, among others, that it was not made within the time limited by law. The trial judge sustained the demurrer on the ground stated, and after the petitioner had refused to plead further, entered an order dismissing the petition. This appeal is from the order so entered.

The general statutes relating to the vacation and modification of judgments (Rem. & Bal. Code, § 464 *et seq.*), and the general statute relating to the vacation of judgments when there has been no personal service of the summons on the judgment obligors within the jurisdiction of the court (Id., § 235), limit the time within which an application can be made to vacate a judgment for the causes therein set forth to one year after the rendition of the judgment. These statutes comprise all of the statutory grounds for the vacation of judgments except in a single class of cases, namely, actions to recover possession of real property where the service is by publication and judgment given for failure to answer. By § 806 of the code it is provided that in such actions and in such cases, the defendant, or his successor in interest, shall be entitled, upon application made at any time within two years from the rendition of the judgment and the payment of the costs of the action, to an order vacating the judgment and granting him a new trial. The appellants contend that the action in question was an action to recover possession of real property, and hence subject to the special rule applicable to such actions. Whether it is such an action or not is the sole question presented on this appeal.

That the action is ostensibly an action to quiet title to real property, rather than one to recover the possession

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thereof, is made clear by an examination of the allegations of the complaint and the prayer for the relief sought, the substance of which we have hereinbefore set out. It is evident, also, that the appellants did not need to resort to the courts to obtain possession of the property. It was at that time vacant and unoccupied, and was subject to be taken into physical possession by mere occupancy on their part. But there were adverse claims to the property which the plaintiffs desired to remove, and the question is, could they do so without bringing an action to recover possession, within the meaning of § 806 of the code above cited. In other words, is there a distinction between an action to recover possession of real property, and an action to quiet title to real property. We think there is, and that this distinction is pointed out in the statutes themselves.

By § 705 of the code (Rem. & Bal.), it is provided that any person "having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county," and "may have judgment in such action quieting or removing a cloud from plaintiff's title." The fact that the two forms of relief are specially provided for shows that, in the minds of the lawmaker, the one did not include the other. Then again, by § 809 of the code, it is provided that any person in possession by himself or by his tenant of real property, or when such real property is not in the actual possession of any one, may maintain a civil action against any person claiming any interest therein for the purpose of determining such claim or interest. This, we think, likewise authorizes an action to be brought to remove a cloud from, or to quiet title to, real property without including therein the specific relief of a recovery of the possession of such property. We have not overlooked the contention that this latter section applies only to these cases where the plaintiff is claiming title under a patent from the United States, and that the plaintiffs in the case at bar did not so claim in their

complaint. But this clause of the statute means nothing more than that the title to the land must have passed from the government of the United States by patent in order that the claimant may maintain such an action, not that the claimant must be the very person to whom the patent was issued. It is true, also, that the plaintiffs did not specifically allege that they claimed title to the specific property under patent from the United States, but they did allege that they were the owners of the same in fee, which sufficiently complies with the requirements, especially against an objection made for the first time after judgment.

Again it is said that the action to quiet title is essentially an action to recover possession, and that this court has heretofore so held. *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483, *Carlson v. Curran*, 48 Wash. 249, 93 Pac. 315, and *Garvey v. Garvey*, 52 Wash. 516, 101 Pac. 45, are cited as maintaining the position; but we think the appellants have misunderstood these cases. In the first of the cited cases, we are unable to find anything which touches upon the question here at issue. The case is too long to be even epitomized here, but the principle announced was that an action of equitable cognizance would lie in the first instance to recover possession and quiet title to real property when the right to recover was based on equitable principles, and that there was no necessity to resort to the common law action of ejectment in such cases, overruling *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531, and other cases holding the contrary doctrine; it was not held that an action to quiet title was essentially an action to recover the possession of real property. In the second case, the doctrine of *Brown v. Baldwin*, *supra*, was affirmed. The third case contains language that, when dissociated from the facts of the case, seems to support the appellants' contention. But that was an action brought by one out of possession against one in possession to cancel and set aside certain deeds which appeared as clouds upon the appellant's title. The court said that the right of possession

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was not in question; that the right depended upon the title and followed it; and that, in quieting title in the respondent, the court necessarily adjudicated the right of possession; hence, it was not error for the court to award possession in its decree. But it was not said that all actions to quiet title were essentially actions to recover possession of real property; and from the nature of things they could not be, as witness the action brought by a person in possession of real property to quiet title thereto. We conclude, therefore, that the petitioners were not entitled to have the judgment vacated as of right.

It is said, finally, that the judgment was obtained by the plaintiffs through fraud practiced upon the court, and that where fraud is alleged the court is not limited to one year in which to set aside a judgment. But we think it is so limited where the application is made under the provisions of the statutes relating to the vacation of judgments. The inquiry into the right to vacate is limited in this form of proceeding. The petition to vacate alone practically controls the issues; the statute providing that application to vacate judgments (except for certain specified causes of which fraud is not one) shall be by petition, that the petition shall be deemed denied without answer, and that the cause of the petition shall alone be tried. To set aside a judgment on the ground of fraud after the statutory period has expired, where the fraud does not appear upon the face of the record, we think there must be an action in the nature of a suit in equity brought in the regular way in which the defendants shall have the opportunity to set up any and all such defenses as they may have.

The application to vacate was properly denied, and the order appealed from will stand affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9593. Department One. March 18, 1912.]

**WILFRED F. HAYWORTH, *Respondent*, v. GEO. M. McDONALD
et al., *Appellants*.¹**

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS—MOTION TO VACATE JUDGMENT. Affidavits annexed to a motion to vacate a judgment and by reference made a part of the motion, cannot be made a part of the record by the certificate of the clerk, and will not be considered on appeal in the absence of any statement of facts or bill of exceptions.

JUDGMENT—DEFAULT—FAILURE TO ANSWER—APPEARANCE. An answer filed after a default had been entered, without leave of court, and not served on the plaintiff, does not constitute an appearance preventing a judgment by default.

JUDGMENT—DEFAULT—AMOUNT—JURISDICTION—COLLATERAL ATTACK. A default judgment on a bond for the amount of the penalty, and \$400 additional as attorney's fees, and for costs, is not void for want of jurisdiction as exceeding the penalty of the bond, but merely erroneous to be corrected by appeal or statutory proceeding; and the objection cannot be first raised on appeal from an order refusing to vacate the judgment on a motion based on other grounds (MOUNT, J., dissenting).

CORPORATIONS—ACTIONS—VENUE—PRESUMPTION—DOING BUSINESS IN COUNTY. Under the statutes authorizing a corporation to be sued in any county where it transacts or transacted business at the time the cause arose, it will be presumed that the corporation did business in a county where it was sued, if there is nothing to the contrary in the record; and a default judgment may be taken against a corporation on a bond executed in the county in which the suit was brought; as that would be the transaction of business in that county, within the meaning of the statute.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered July 27, 1910, upon the default of the defendants, and from an order refusing to vacate the default, entered December 8, 1910, in an action upon a bond. Affirmed.

Sam B. Hill and *W. A. Reneau*, for appellants.

McGuire & Hannan, for respondent.

¹Reported in 121 Pac. 984.

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Opinion Per FULLERTON, J.

FULLERTON, J.—Sometime in September, 1909, Geo. M. McDonald and Jesse T. Cull, then copartners doing business as Geo. M. McDonald and Company, began an action in the superior court of Douglas county against Wilfred F. Hayworth, to recover the sum of \$1,000 and interest, alleged to be due upon a promissory note which the respondent had theretofore made and delivered to them. At the time of the commencement of the action, the appellants caused an attachment to issue against the property of Hayworth, based on the grounds that he was about to remove a part of his property from the state of Washington with the intent to defraud his creditors, and was about to convert a part thereof into money with intent to place it beyond the reach of his creditors. The attachment bond was executed in the sum of \$3,000, and was conditioned as required by statute. It did not bear the signature of the plaintiff in the action, but was signed by Geo. M. McDonald & Co., Inc., a corporation, and by the two other persons named in the body of the bond as sureties, the corporation not being named therein either as principal or surety. Pursuant to the writ of attachment, the sheriff of Douglas county seized certain personal property belonging to Hayworth, on October 7, 1909, and held the same until April 20, 1910, when the attachment was dissolved and the writ discharged on the procurement of Hayworth.

Thereafter, and on June 14, 1910, the respondent Hayworth began an action in the superior court of Douglas county against the plaintiffs in the attachment action and the sureties upon the bond, including the corporation Geo. M. McDonald & Co. Inc., to recover for wrongfully suing out the attachment. Personal service of the summons and complaint was made upon all of the defendants on June 25, 1910, the service upon the corporation being made in Grant county, as the return recites, at "their usual place of business." On July 16, 1910, the plaintiff moved for default against the defendants for failing to appear in the action, accompanying

his motion with the usual proofs showing that no appearance had been made. The motion was granted by the court commissioner of Douglas county, and the default of each of the defendants was formally entered. On July 19, 1910, the clerk of the court received and filed what purported to be an answer to the complaint. It was not, however, accompanied by any proof of service. On July 27, 1910, the plaintiff produced proofs of his cause of action before the court commissioner, and the commissioner on that day made findings of fact to the effect that the plaintiff had been damaged in a sum of money in excess of the penalty named in the bond and entered judgment in appellant's favor against each and all of the defendants for that sum, namely, \$3,000, together with an attorney's fee of \$400, and the costs of the action taxed at \$21.60.

On August 2, 1910, the defendants, by their attorney, moved to set aside the judgment and open the default, reciting in the motion that they had a good and sufficient defense to the action, and that within 20 days after the service of summons upon them, namely July 15, 1910, they had served upon the attorneys of record an answer in said cause, and had caused the same to be filed with the clerk of the court wherein the action was pending, and that the same was on file when the judgment in the action was taken. The motion recited that it was based on the record and files in the action, and upon the affidavit of their attorney thereto annexed, and "by reference hereto made a part of the motion." This motion was overruled by an order entered on December 8, 1910. The appeal before us was taken on March 3, 1911. It purports to be taken from the judgment of July 27, 1910, as well as the order refusing to vacate the same entered December 8, 1910.

The appellants failed to propose or have certified into this court any statement of facts, and the case is here on a transcript of so much of the record as the appellants have seen fit to direct the clerk to transmit to this court. In the record

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so certified, are copies of two affidavits filed for use on the motion to vacate the judgment. The respondent objects to the consideration of these affidavits on this appeal on the grounds that they are not properly a part of the record, the same being in the nature of evidence which can only be brought to this court by a statement of facts. This objection is well taken. We have, in a long line of cases, held that affidavits filed as proof of particular facts cannot be made a part of the record in this court by the mere certification of the clerk. *State v. Lee Wing Wah*, 53 Wash. 294, 101 Pac. 873, *Sakai v. Keeley*, 66 Wash. 172, 119 Pac. 190, and cases cited. The appellants contend, however, that the affidavit filed in behalf of the appellants is before the court because attached to the motion and especially referred to therein, thus falling within the rule of *State v. Vance*, 29 Wash. 435, 70 Pac. 34. The case cited was somewhat peculiar in its facts. The affidavit there referred to was "an integral and inseparable part of the motion, attached thereto, constituting a part thereof," and the court expressly recited in its order that it "had read the same in support of the motion." Moreover, there was a statement of facts in the case in which all of the evidence material to inquiry before the superior court was incorporated. In the case at bar, there is no statement of facts; it is not shown that the court based its order upon the affidavit; nor is it shown that there were not other and opposing proofs in the record on the same subject. These differences clearly show the inapplicability of the case cited to the facts of the case at bar. The appellant cannot successfully claim to have been misled by the case cited. That no such result might follow, this court early took occasion to point out the differences between that case and the ordinary case where affidavits were attached to a motion and certified into this court by the clerk as a part of the motion. This the court did in the case of *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487, where it was expressly held that there was no intention by the case of *State v.*

Vance to overrule the previous cases in which the rule now adhered to was laid down. The reason for the rule, as we have announced it, is plain. If the court recognized the practice here contended for, it would either review the orders of the lower court upon a partial and incomplete record or it would place upon the respondent the duty of making up the record on appeal. We are clear that the affidavits certified into the transcript by the clerk cannot be considered as a part of the record on this appeal.

With these affidavits eliminated, there is only one question open for review, namely, is the judgment sought to be vacated void upon its face, or on the face of the record properly before us. The first contention in this respect is that the judgment was entered after an answer had been filed putting in issue the material allegations of the complaint. But the objection to this is that the answer is improperly in the record. It was filed after default had been taken and entered, and without leave of the court, and was not served upon the plaintiff. This did not constitute such an appearance in the case as the statutes contemplate, and the court properly proceeded to enter judgment in disregard of the answer.

Next, it is said that a judgment was entered against the bondsmen obligated on the bond sued upon in excess of the penalty thereof. As we have stated, the penalty of the bond was in the sum of three thousand dollars, while the judgment was in that sum together with the sum of four hundred dollars taxed as attorney fees, and twenty-one dollars and sixty cents taxed as costs. There may be some question whether, under the statute, an attorney's fee and the costs of the action may be recovered against the obligors on an attachment bond in excess of the penalty fixed therein; but, if it be so conceded, the fact does not render the judgment void. It would be error merely which must be corrected by an appeal from the judgment, or by some revisory proceeding afforded by the statute attacking the judgment upon this ground. It was not so attacked in this case. This objection appears to

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have been raised in this court for the first time; at least this ground was not made an integral part of the motion to vacate the judgment.

Finally, it is said that the judgment is void as to the corporation because not brought in a county where the corporation has an office for the transaction of business, or in a county where some person resides upon whom process may be served against the corporation. *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, and the cases following that case are cited as maintaining the contention. But the statute has been materially changed since these cases were determined. It is now provided that an action against a corporation may be brought in any county in which the corporation transacts business, or transacted business at the time the cause of action arose. There is nothing in the record that tends to show that the corporation in question does not transact business in Douglas county, the county in which the action was brought, and the court will presume, in the absence of some showing to the contrary, that it did so transact business. Furthermore, the execution of the bond which gives rise to the cause of action against it was executed by it for use in Douglas county. This would be such a transaction of business in that county as to authorize an action upon the bond therein.

There is no reversible error in the record, and the judgment will stand affirmed.

PARKER and GOSE, JJ., concur.

MOUNT, J. (dissenting)—I cannot agree that a judgment upon a bond may be taken for more than the face of the bond with costs. I therefore dissent.

[No. 10034. Department Two. March 18, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.
C. W. WAPPENSTEIN, *Appellant*.¹

INDICTMENT AND INFORMATION—DUPPLICITY—BRIBERY. Under Rem. & Bal. Code, § 2321, making the soliciting and accepting of a bribe a felony, an indictment charging that the accused asked for, received and accepted a bribe is not duplicitous, since the act of soliciting and the act of accepting a bribe are not separate and distinct offenses, and may be laid conjunctively in a single count.

CRIMINAL LAW—EVIDENCE—DECLARATIONS—CONVERSATIONS IN ABSENCE OF DEFENDANT—HEARSAY—CONSPIRACY. Under an indictment charging the defendant with having solicited and accepted bribes from two others under an agreement, understanding and promise to allow them to conduct houses of prostitution in violation of law, evidence of a conversation between the two in pursuance of the design, when the defendant was not present, is not objectionable as hearsay, where in connection with evidence of what took place in defendant's presence, it tends to establish the unlawful conspiracy, combination or agreement alleged in the indictment, and there was already sufficient evidence proper to go to the jury tending to establish the conspiracy.

SAME. Such evidence was not inadmissible because of no prior consummated corrupt agreement or conspiracy, since it is immaterial at what time any one entered into the conspiracy, all being deemed parties to every act done in furtherance of it.

SAME—EVIDENCE OF CONSPIRACY—SUFFICIENCY. In a prosecution of a chief of police, there is sufficient *prima facie* proof of the fact of a conspiracy between him and two others, for the conducting of houses of prostitution in violation of law, to permit the introduction of evidence of the acts and declarations of the two when the defendant was not present, where it appears that the chief, just prior to taking office, had suggested to one of them that it would be the policy to open up such places, and that "all of us" could make some money thereby, and expressed a desire to meet the other conspirator and a meeting between them was arranged, and that some weeks prior thereto the two had agreed to rent such houses in case the city election resulted as it had.

INDICTMENT AND INFORMATION—ELEMENTS OF OFFENSE—BRIBERY—EVIDENCE OF CONSPIRACY—ADMISSIBILITY. Where an indictment charges a chief of police with soliciting and accepting bribes from

¹Reported in 121 Pac. 989.

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two others, under an agreement, understanding and promise to permit them to conduct houses of prostitution in violation of law, the unlawful conspiracy is an essential element, though not the gravamen of the offense, making proof of the conspiracy essential to establish the crime, and such proof could be made in the same manner as if the conspiracy was the gist of the offense.

CRIMINAL LAW—EVIDENCE—ORDER OF PROOF—CONSPIRACY AS PART OF OFFENSE—ADMISSIBILITY. An objection that before the acts and declarations of the conspirators can be admitted in further proof of the conspiracy, there must be prior evidence *aliunde*, establishing *prima facie* the existence of the conspiracy, is one that goes only to the order of proof, which rests largely in the discretion of the trial court.

WITNESSES—IMPEACHMENT—DISCREDITING IMPEACHMENT. A witness having been impeached by his prior inconsistent evidence given before an investigating committee of the city council, may properly be allowed to explain that he at that time believed that the committee had no authority to put him under oath.

CRIMINAL LAW—EVIDENCE—OTHER CRIMES—INTENT—EVIDENCE—ADMISSIBILITY. In a prosecution of a chief of police for accepting bribes under a conspiracy with two others to conduct two certain houses of prostitution in violation of law, evidence that the defendant had sent the proprietors of other houses to the conspirators, and endeavored to interest them in the conduct of other houses, and that the defendant had interfered with the running of other houses not conducted by the conspirators, is admissible as tending to show the corrupt relations of the parties and guilty intent and at least slightly probative of the conspiracy.

CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE—EXAMINATION OF WITNESS. Where, in a prosecution for soliciting and accepting a bribe, under a conspiracy with two others to conduct houses of prostitution in violation of law, a witness who was the keeper of such a house had covertly insinuated that something said to him by the defendant had led him to go to one of the conspirators with money to bribe the defendant, and the witness was not frank in stating what had been said, it is not prejudicial misconduct on the part of the court to insinuate that the witness was not answering truthfully and admonish him to state the truth and what defendant had said, and to assume that something was said to him about going down and offering money, and that if the defendant had not said anything, to let the witness say so, where the purpose of the court was clearly either to kill the insinuation which the witness had made against the defendant or bring out the ground on which it was made; the result being that the witness denied that the defendant had said anything about money, and testified that he had

made an offer of money to a conspirator on his own initiative which offer was refused; since it was to the advantage of the defendant.

APPEAL—REVIEW—OBJECTIONS NOT PRESENTED BELOW. An objection that evidence should have been struck out cannot be urged on appeal where no motion to strike was made below.

BRIBERY—ACCEPTING BRIBE—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction of a chief of police of soliciting and accepting bribes under an agreement with two others to allow them to conduct houses of prostitution, where the evidence of the two conspirators establishing the agreement and offense was corroborated by the fact of their securing and conducting two certain houses immediately thereafter, by the defendant's consent, and corroboration as to the payment of sums of money at various times, and the deposit of large sums by the defendant or members of his family.

CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CREDIBILITY—CORROBORATION—NECESSITY. The fact that witnesses are accomplices goes only to their credibility, and a conviction may be sustained upon their uncorroborated testimony.

SAME—INTIMIDATION OF WITNESS—INDUCEMENTS. A conviction upon the testimony of accomplices cannot be objected to as secured by threats and intimidation of the witnesses or improper inducements held out to them, where it merely appears that the state had knowledge of other offenses committed by the witnesses, who hoped to better their position by telling all they knew, and were simply advised that, under the constitution, their evidence could not be used against them in any proceeding except for perjury in giving the evidence.

CRIMINAL LAW—TRIAL—INSTRUCTIONS—REASONABLE DOUBT. An isolated clause in an instruction to the effect that no reasonable doubt exists if the jury is "morally certain" about the matter is not prejudicial error, when the instructions as a whole clearly instructed as to the burden of proof, the presumption of innocence, the distinction between the *quantum* of proof in civil and criminal cases, and declared that a reasonable doubt is one that must arise from the evidence.

SAME—DISCREPANCIES IN TESTIMONY—CAUTIONARY INSTRUCTIONS. Cautionary instructions against being led afield by discrepancies and inconsistency in the evidence which have no bearing upon the main issue in the case are not erroneous as eliminating disputed and material facts, where the testimony was very voluminous and there was danger of the jury becoming hopelessly involved in a maze of collateral issues, and no fact was taken from the jury, the jury being told that they were the exclusive judges of the evidence and of its weight and the credibility of the witnesses.

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CRIMINAL LAW—"ACCOMPLICES"—CONSPIRACY AS ELEMENT OF OTHER CRIME—PRINCIPALS AND ACCESSORIES—STATUTES. Where a chief of police was charged with soliciting and accepting bribes from two others under an agreement to permit them to conduct houses of prostitution in violation of law, the crime charged was that of accepting bribes, and not a conspiracy, and although proof of conspiracy was necessary as an element of the offense, it was not the offense charged; hence the conspirators were not accomplices, the offense of giving and offering a bribe being a distinct and separate offense from soliciting and accepting a bribe, under Rem. & Bal. Code, §§ 2320, 2321; and this, notwithstanding the provision of Id., § 2007, abolishing the distinction between principals and accessories, and § 2260 defining principals as all participants, as the sections are general and have no application to acts expressly designated as primary crimes in themselves.

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 19, 1911, upon a trial and conviction of accepting a bribe. Affirmed.

Morris & Shipley and Harold Preston, for appellant.

John F. Murphy, George H. Rummens, and H. B. Butler, for respondent.

ELLIS, J.—The defendant was indicted for the crime of asking for, accepting, and receiving a bribe. The indictment charged that the defendant, being chief of the police department of the city of Seattle, asked for, accepted and received from Gideon Tupper and C. J. Gerald \$1,000, as compensation, gratuity, reward and bribe, upon an agreement, understanding, and promise that he would thereby be influenced, governed, and controlled in the discharge of his official duty and action upon matters then pending which might be brought before him, and in consideration thereof and of that agreement, did, in violation of his official duty, permit and allow Tupper and Gerald, jointly or severally, to conduct, in violation of law, two houses of prostitution, designated as the "Paris House" and "The Midway," in the city of Seattle. A motion to quash the indictment was denied. A demurrer thereto was overruled. The defendant entered a plea of not

guilty, was tried, and the jury disagreed. A second trial was had resulting in a verdict of guilty. Motions for a new trial and in arrest of judgment were denied by the court. Judgment was entered and sentence imposed. From the judgment and sentence, this appeal was taken.

There are numerous assignments of error, but they are grouped under eight heads in the briefs, and will be so treated in this opinion.

(1) It is first contended that the demurrer to the indictment should have been sustained, in that it charged more than one offense. It is argued that Rem. & Bal. Code, § 2321, makes the act of soliciting and the act of accepting a bribe separate and distinct offenses. We find no support for this position. While the statute makes either of these actions sufficient to constitute the crime, they are but alternative constituents of the same statutory offense. They may be laid conjunctively in a single count and proof of either will sustain the charge.

“It is a well settled rule of criminal pleading that when an offense against a criminal statute may be committed in one or more of several ways, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute. So where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment may charge any or all of such acts conjunctively as constituting a single offense.” 22 Cyc. 380. See, also, *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873; *State v. Adams*, 41 Wash. 552, 83 Pac. 1108; *State v. Smalls*, 11 S. C. 262; *State v. Wynne*, 118 N. C. 1206, 24 S. E. 216; *People v. Gosset*, 93 Cal. 641, 29 Pac. 246; *State v. Beebe*, 115 Iowa 128, 88 N. W. 358; *State v. Marion*, 14 Mont. 458, 36 Pac. 1044; *Hale v. State*, 58 Ohio St. 676, 51 N. E. 154; *Cranor v. Albany*, 43 Ore. 144, 71 Pac. 1042; *State v. Donaldson*, 12 S. D. 259, 81 N. W. 299; *Boldt v. State*, 72 Wis. 7, 38

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N. W. 177. No authority to the contrary has been cited. The demurrer was properly overruled.

(2) It is contended that the court erred in admitting testimony of Gerald as to conversation and transactions between himself and Tupper not in the presence of the defendant. Gerald had testified as to a conversation between himself and the defendant in which the defendant stated that it would be the policy to open up the restricted district; that the defendant had then said, "There will be a chance for all of us to make some money." That the witness had suggested to the defendant that he had a man he "wanted to get on down there;" that Tupper was the man; that defendant expressed a desire to meet Tupper; that arrangements were then made for a meeting between Tupper and defendant; that, a few days afterwards, the three met in Gerald's saloon, and the introduction took place; that the defendant then told Tupper to "go and get The Midway;" that Gerald then went away leaving Tupper and the defendant together. This was after announcement that defendant would be chief of police, but before he actually assumed that office. Gerald was then permitted, over objection, to testify that Tupper told him afterwards that he had secured The Midway; that he could also get the Paris House; that, as the witness remembered, Tupper told him that the defendant had instructed Tupper to get the Paris House; that Tupper said the defendant told him that he would have to pay to the defendant \$10 for each woman; that the witness said to Tupper that "It was pretty strong, but I guessed he would have to stand for it;" that prior to that time an agreement was made between Gerald and Tupper to secure the crib houses and divide the proceeds of the business equally; that, after these conversations, Tupper paid Gerald his share once a month; and that, on making these various payments, Tupper told him that he, Tupper, had paid to the defendant "some months five hundred, sometimes six hundred or seven hundred . . . at the rate of ten dollars a woman."

It is first objected that this evidence should have been excluded as hearsay. This is not tenable. It was admissible, together with the evidence of what took place in the defendant's presence, as tending to prove the unlawful agreement, combination, or conspiracy, alleged in the indictment as one of the elements of the crime charged. There was already evidence sufficient to establish *prima facie* an agreement to open and operate houses of ill-fame contrary to law, for gain. The antecedent agreement between Gerald and Tupper, the meeting of Gerald with the defendant, the defendant's suggestion that there was a chance for all to make some money, Gerald's suggestion that he wanted to get Tupper "on down there," and the subsequent meeting of the three, and defendant's direction to Tupper to "get The Midway" could have no other meaning or purpose. The minds of the parties had met understandingly on the common design. The conspiracy is the natural interpretation of these events. There was thus already sufficient evidence proper to go to the jury tending to establish the conspiracy. It is well established that, where several have united together for an illegal purpose, any act done by one of them, or any of them, in prosecution of that common purpose or design, is, in the eye of the law, the act of all, and evidence of such act is admissible against all or any of them. The same is true of individual declarations touching the common design.

"The proof of conspiracy which will authorize the introduction of evidence as to the acts and declarations of the co-conspirators may be such proof only as is sufficient, in the opinion of the trial judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury, as *tending* to establish such fact." *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320.

"Upon this subject, Mr. Greenleaf has said: 'A foundation must first be laid by proof sufficient, in the opinion of the judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. The connection of the indi-

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viduals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by others, and a party to every act which may afterwards be done by any of the others in furtherance of such common design.' 1 Greenl. Ev. Sec. 111." *Card v. State*, 109 Ind. 415, 9 N. E. 591.

See, also, *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *People v. McCann*, 247 Ill. 130, 98 N. E. 100; *United States v. Breese*, 173 Fed. 402.

The evidence complained of was admissible as primary evidence under the substantive law of conspiracy. It was not obnoxious to the rule against hearsay. Wigmore, Evidence, § 1797.

It is next urged that this evidence of the acts and declarations of Gerald and Tupper was inadmissible because there was no prior consummated corrupt agreement or conspiracy. What we have said of the prior objection effectually disposes of this. Gerald testified that he and Tupper had, some six weeks prior to the first conversation with the defendant, agreed with each other that if H. C. Gill was elected mayor they would rent crib houses for the purpose of prostitution, Tupper to be manager and Gerald a silent partner. After Gill's election, the conversations with the defendant took place. As we have seen, this evidence established *prima facie* a corrupt agreement. True, there was no evidence of a formally expressed agreement. Conspiracies are seldom susceptible of such proof. But there was evidence of a meeting of the minds, a unity of design, and a co-operation of conduct which could only mean that there was such an agreement. This was sufficient foundation for the admission of

evidence of subsequent independent acts and declarations of each of the parties as against any one of them.

“In one of its charges the court told the jury, in substance, that it was not essential to the formation of a conspiracy that there should have been any formal agreement between the parties to do the acts charged; that it would be sufficient if the minds of the parties understandingly met, so as to bring about an intelligent and deliberate agreement to do the acts and commit the crimes charged, although such agreement was not manifest by any formal words. The law was well and accurately stated in the foregoing charge, and the objections urged against it cannot prevail. Concurrence of sentiment and co-operative conduct in an unlawful and criminal enterprise, and not formality of speech, are the essential ingredients of criminal conspiracy.” *McKee v. State, supra*.

See, also, *State v. Caseday* (Ore.), 115 Pac. 287; *State v. Thompson*, 69 Conn. 720, 38 Atl. 868; *Spies v. People, supra*.

It is argued that, if the conspiracy was not the crime charged, then the acts of the other conspirators were not admissible against the defendant. The conclusion does not follow the premise. The conspiracy was an essential element of the crime charged, a means to its commission, though not the gravamen of the offense. The conspiracy once *prima facie* established, the parties were so related in the common enterprise in connection with which the crime charged was committed, that the act and declarations of one in furtherance of the common design were admissible as against the others as those of a confederate. The fact that the defendant may have entered into the conspiracy as a means of committing the crime of accepting a bribe, which he alone could commit, would not change the rule of evidence as to the proof of the conspiracy. Since proof of the conspiracy was necessary to establish the crime as charged, that proof could be made in the same manner and by the same kind of evidence as if the conspiracy had been the gist of the offense charged. No logical reason to the contrary has been advanced.

As a third ground of objection, it is contended that, be-

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fore acts or declarations of co-conspirators can be admitted in further proof of a conspiracy, there must be prior evidence *aliunde*, establishing *prima facie* the existence of the conspiracy. As we have seen, there was such prior evidence. Moreover, this objection goes only to the order of proof which, in cases where conspiracy is an essential element, is always a matter within the discretion of the trial court.

"On account of the difficulty in proving the conspiracy and bringing the guilty to justice there is no class of cases in which it is more important that the trial judge should have a large discretion as to the order in which evidence should be received, and this discretion cannot be reviewed on error except in clear cases of abuse. It is frequently said that the acts and declarations of one conspirator cannot be admitted in evidence against his fellow conspirators until proof has been made of the existence of the conspiracy. There is, however, no unvarying rule to this effect. According to the great weight of authority the order in which the testimony shall be received is largely in the discretion of the trial court. If the circumstances of the case are so peculiar and urgent as to require it, the acts and declarations of a conspirator may be introduced in the first instance before proof of the agreement." 8 Cyc. 682.

See, also, *People v. Saunders*, 25 Mich. 119; *State v. Thompson*, *supra*; *State v. Miller*, 35 Kan. 328, 10 Pac. 865; *State v. Jackson*, 82 N. C. 565; *Luttrell v. State*, 31 Tex. Cr. 498, 21 S. W. 248; *Harris v. State*, 31 Tex. Cr. 411, 20 S. W. 916; *Drake v. Stewart*, 76 Fed. 140; *Spies v. People*, *supra*. Neither of the objections urged was well taken. The evidence complained of was properly admitted.

(3) The state's witness Gerald, in explanation of prior statements made before an investigating committee of the city council inconsistent with his testimony at the trial, was permitted to testify, in effect, that he then believed the committee had no authority to put him under oath. It is urged that this was error in that it was an attempt to weaken the effect of the impeachment. We think this was permissible.

That is the purpose of every explanation of conflicting statements. The witness having admitted the prior contradictory statements, it was not error to permit his giving as a reason therefor that he then did not consider himself under a binding oath. Evidence of the circumstances, state of mind, and what was intended to be accomplished by the prior statement, is always admissible, whether tending to sustain or to discredit it. *Wheeler v. Buck & Co.*, 23 Wash. 679, 63 Pac. 566.

(4) It is contended that the court erred in admitting evidence as to collateral matters and circumstances relating to other houses than the Midway and the Paris, and other persons than Gerald and Tupper. Under this contention, it is first urged that the court erred in admitting testimony of Tupper tending to show that the defendant sent one Long to him with a view to opening other houses of prostitution; that Tupper refused to talk to Long, and afterwards told the defendant that he did not know Long and wished the defendant would not send Long to him; that defendant told Tupper he would give him an interest with Long which offer Tupper refused. It is argued that this tended improperly to extend the conspiracy alleged in the indictment to other houses or proprietors. The manifest purpose and tendency of this evidence was to show the corrupt relations existing between Tupper and the defendant, and the criminal intent of these relations on defendant's part. The fact that it further tended to show a willingness on the defendant's part to extend those relations to others did not render it inadmissible.

"Where the guilt of a party depends upon the intent, purpose, or design with which an act is done, or upon his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into for the purpose of establishing such guilty intent, design, purpose or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or as induced by the same motive, and it is immaterial that they show the commission of other crimes. The evidence in a conspiracy is wider

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than perhaps in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances." 8 Cyc. 684.

See, also, *State v. Craddick*, 61 Wash. 425, 112 Pac. 491; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *State v. Lewis*, 96 Iowa 286, 65 N. W. 295; *State v. Ames*, 90 Minn. 183, 96 N. W. 330; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *Commonwealth v. Stuart*, 207 Mass. 563, 93 N. E. 825; *Joyce v. State*, 88 Neb. 599, 130 N. W. 291.

A cognate contention is advanced as to the testimony of one John Armin as to an interview of Armin and Long with the defendant. Armin owned a house called the Big Casino, which he testified was tenanted by "sporting girls." The house was managed by Long. About thirty days after the defendant assumed the office of chief of police, the back entrance to this house was closed. Armin and Long went to see the defendant about it and the defendant had said: "What are you fellows trying to do, run a bargain counter; if you fellows can't agree I am going to shut up the houses down there." They then went away, the defendant having instructed Long to come and see him again. This evidence, so far as it had any bearing, tended to show an interference with other houses of ill-fame than those operated by Gerald and Tupper. So far as it had that tendency, it was material as at least slightly probative of the agreement between the defendant and Gerald and Tupper. It had no other purpose or tendency, and the defendant was in no manner prejudiced by its admission.

Long testified concerning this and other interviews had by him with the defendant when Armin was not present, stating that the defendant told him to see Tupper about connecting the "Big Casino" with the "Midway" by a bridge across the alley; also, about fixing the amount of rents, apparently

meaning what rents the inmates of the houses should pay. He also testified as follows:

“Q. Well, did he tell you to see Tupper? A. Yes. Q. And did you see Tupper in accordance with the orders given you by Wappenstein? A. Yes. Q. What did you say to him? A. I told Tupper that I wanted to do what the rest were doing, if the rest were paying, I wanted to pay. Q. What did Tupper say to you, if anything? A. Tupper says that he wouldn't take any money at all; he kind of turned me down, turned me shortly.”

After some evasion by the witness, the following colloquy took place:

“The court: Let him answer again. A. I told Tupper that Mr. Wappenstein sent me to him to see him about the business but he never told me to go to him about money. Q. But you did go to him with money to pay Wappenstein? A. Yes. By the Court: Q. Did Wappenstein tell you to go to him about business? A. Yes; but not about money. Q. I want to know the truth, what was Wappenstein's language when he said that? A. As I told you, he told me to go once and see about rents, and about the alley, and about fixing the bridge. He never come right out and said about going to see him about money. Q. By Mr. Murphy: Well, did he about business? A. Well, the way I figured it—The court: Now, what did he say to you, Mr. Long, I want to know what he said? A. I am telling what he said. Q. You are not telling it truthfully then. A. He has asked about different conversations. Q. What was said to you about going down there and offering money to Tupper? What did Wappenstein say to you that caused you to do that? A. Nobody told me to go and see him about giving him money. Q. That isn't answering my question. What had Wappenstein said that caused you to go and make that proposition to Tupper? Mr. Morris: Your honor, you are assuming. The court: Yes, I am assuming. If Wappenstein didn't say anything to him, let him say so. A. Wappenstein never said anything about going to see him about money.”

It is contended by counsel that the court committed prejudicial error in assuming that the witness was not telling the

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matter truthfully. While under most circumstances such a remark would be held prejudicial, it was plainly not so in this instance. The witness, as shown by the testimony quoted, and much more of the same character, had covertly insinuated that something said by the defendant had led him to go to Tupper "with money to pay Wappenstein." This, without further light, would have been extremely prejudicial to the defendant. It was obvious that the witness was not frank. The court's remark, though unfortunately worded, was no more than an admonition to speak out frankly. Neither the jury nor any one else could have understood it differently, in view of the prior insinuation of the witness. That the court had in mind fairness to the defendant, as well as to the state, was made plain by his statement, "Yes, I am assuming. If Wappenstein didn't say anything to him, let him say so." We cannot hold that an admonition, to a manifestly disingenuous witness, to be frank, though incautiously worded, will constitute ground for reversal, when, as in this instance, the purpose of the court was plain to either kill the insinuation or bring out the ground upon which it was made. The admonition, even worded as it was, was certainly much less damaging to the defendant than the evasive testimony would have been had it passed unchallenged by the court. After this incident, the court directed the jury to withdraw, and in its absence admonished the witness to state his grounds for offering money, and explained his attitude to the witness and counsel:

"The court: I am simply instructing this witness. This court is here for the truth, and I want the truth. I don't want this witness to be intimidated by the court. The court believes that he made that proposition to Tupper. Now, then you had some reason for making that proposition, and if that reason grew out of anything the chief told you, I want to know it. If it didn't grow out of anything the chief told you, I want to know it. I don't propose to let any witness conceal anything that is true and volunteer anything that is not true."

On the return of the jury, the witness again stated, "Yes Mr. Wappenstein sent me to Mr. Tupper; but as I said before not regarding money. He sent me to Mr. Tupper but not regarding money." And on cross-examination, the witness stated, in effect, that he went to Tupper with money on his own initiative. It is obvious that the court's admonition was of distinct advantage to the defendant. The supreme court of Iowa, in passing upon a similar incident, very recently used the following language:

"Among the witnesses produced on the trial was one of the young women referred to in the indictment. While being examined by counsel for the state, she was sharply reprimanded by the court, and warned that she must answer the questions propounded to her, and tell the truth. Of this the appellant vigorously complains, and says that it was in effect a suggestion to the jury that defendant was guilty, and that the witness was testifying falsely. It is quite evident from the record that the witness was testifying with reluctance, and frequently indulged in the answer, 'I don't remember,' and the court appears to have believed that she was evading the inquiries made of her. We are unable to say that the rebuke was not justified. The witness was before the court, which could observe her appearance, conduct, demeanor, and tone, and if these warranted the conclusion that she was not speaking frankly or fully of the matters inquired about it was within the province of the court to interfere and remind the witness that she was under oath, and must tell the truth, and the whole truth. There is nothing in the record to indicate that this discretion was abused." *State v. Poder* (Iowa), 132 N. W. 962, 963.

We find no prejudicial error in this incident. Counsel contends that the testimony of this witness should have been stricken, but as no such request was made, that question is not before us.

(5) The next contention is that the court erred in denying the defendant's motions for a directed verdict and a new trial. The grounds advanced are that the evidence was not sufficient to sustain the verdict, and that there was no evidence corroborating that of Gerald and Tupper, who it is

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claimed were accomplices. An examination of the evidence makes it clear to us that neither ground is tenable. At the risk of prolixity, we will touch upon the salient points of the evidence adduced by the state. The testimony of Gerald, Long and Armin has already been sufficiently reviewed. Tupper testified that Gerald introduced him to the defendant as "The fellow that he had been talking about;" that between the two, Gerald and the defendant, and when all three were present, Tupper was told to go and get the Midway; that this conversation took place after the announcement that the defendant would be chief of police, but before he assumed the duties of that office; that, in pursuance of this conversation, Tupper did secure a lease of the Midway; that on the same day, March 21, 1910, on which the defendant assumed the office of chief of police, Tupper opened the Midway as a house of prostitution. One Hedges, a police sergeant, testified that on that day he was informed by a policeman on that beat that women were going into the Midway, which was the largest house of prostitution in the district; that he investigated and found it true and reported that fact to the defendant who said, "It was all right," and that it was the intention to assemble all prostitutes in the restricted district. Tupper further testified that, after this, Gerald and the defendant suggested that Tupper get another house; that he consulted the defendant about securing the Paris House near the Midway; that one Nichols who had control of that property at first declined to let him have it, questioning his responsibility, and that Tupper referred him to Gerald and the defendant; that he, Tupper, went to the defendant and told him that Nichols would not let him have the house, claiming that he did not know whether Tupper was responsible or not, and that the defendant would have to see about it "so he said he would fix it and see what he could do;" that the next time he saw Nichols he said it was all right, and as a result the "Paris House" was secured, and also opened as a house of prostitution. Tupper further tes-

tified that he had a talk with the defendant soon after opening the Paris House relative to payment for the privilege of running the houses; that the defendant said the landlords used to pay \$10 a month for each woman to the city as a fine, that he did not know whether there was going to be any fine, and he would accept that, that it ought to be worth that. "He thought it wasn't too much. He thought he was entitled to that much, ten dollars a person;" that, in pursuance of this agreement, Tupper made his first payment after the first of May, and thereafter up to August 5th he paid generally soon after the first of the month; that he made these payments to the defendant personally in the office of the chief of police; that he would take currency when the time came and give it to the defendant; that as a rule Tupper went to the bank and got the currency on his personal check. That on August 5, he drew a check for \$1,245, got the money on it in large bills, went to the office of the defendant and paid him \$1,000 as the monthly payment at the rate of ten dollars for each woman of the Midway and Paris Houses.

In corroboration of Tupper, the paying teller of the bank where Tupper kept his account testified that Tupper, at various times, made requests for large bills, and that, on August 5, 1910, Tupper drew his check for \$1,245. The evidence also showed that the defendant deposited the sum of \$1,000 on that day, August 5, 1910, in the Canadian Bank of Commerce where he kept his bank account. There was evidence that the health department kept an account of the number of fallen women in the district, and that the police department also kept a record made from actual count, and that the record for the month of August, 1910, made on July 30, showed 101 inmates of the Midway and Paris Houses. The bookkeepers of the Midway and Paris Houses testified that at various times Tupper held out large sums of money, directing that they be entered as expenses in addition to the ordinary itemized running expenses of the house.

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The evidence showed that the appellant, prior to becoming chief of police, had a safety deposit box in the Seattle Safety Deposit Vaults, as did also his wife; and that these were retained, and his wife also had access to the defendant's box; that on July 12, 1910, he rented a safety deposit box from another institution, which he thereafter visited frequently, and that he and his brother-in-law, one E. B. Benn, visited this box on the morning of February 15, 1911; that the defendant visited the first mentioned box only a few times while he was chief of police; that his wife, on Feb. 15, 1911, shortly after it was announced that a grand jury would be called and shortly before it actually convened, visited this box; and afterwards on the same day there was deposited to her credit in the Canadian Bank of Commerce \$5,000, all in currency, and in the Seattle National Bank, apparently to the credit of defendant's brother-in-law, E. B. Benn, the sum of \$5,000, all in currency excepting \$600 in gold. Benn testified that all of this money belonged to one Samuel Benn and not to the defendant. The testimony of Gerald and Tupper was contradicted by the defendant, and explanations were offered for most of the damaging circumstances. The weight and credibility of all of the evidence was for the jury.

The foregoing makes it plain that the testimony of Tupper and of Gerald was not without corroboration, at least by many circumstances tending to support its truth and to connect the defendant with the crime charged. Moreover, as we shall see, these witnesses were in no legal sense accomplices. In any event, this court has never adopted the stringent rule that uncorroborated testimony of an accomplice will not support a conviction. The fact that witnesses are accomplices goes only to the credibility of their testimony. Lack of corroboration is not alone sufficient to warrant an interference with the verdict of the jury founded upon such evidence. We have but recently expressed what we conceive to be the true rule.

"We are not at all satisfied that the evidence establishes

the fact that they were accomplices in the crime with such degree of certainty as to enable us to say, as a matter of law, that they were such; but, conceding that they were accomplices, their credibility is affected only by that fact, together with the fact that they denied knowledge of the cause of the miscarriage, and made some statements immediately thereafter inconsistent with their testimony. We assume that their testimony was not corroborated, in so far as it related to appellant's connection with the crime. We have heretofore recognized the rule that the testimony of accomplices, without corroboration, may be sufficient to support a conviction. *State v. Jones*, 53 Wash. 142, 101 Pac. 708; *State v. Ray*, 62 Wash. 582, 114 Pac. 439. So the want of corroboration alone is not sufficient to warrant our interference with the finding of guilt by the jury." *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

Much argument was advanced in an effort to show that the testimony of Gerald and Tupper was influenced by threats or intimidation, or by some promise by the prosecuting attorney and the detective Burns of immunity from prosecution from other unlawful enterprises in which they were involved. An examination of the evidence discloses little more than that these men knew they were liable to prosecution for other offenses, and knew that the prosecuting attorney and the detective had knowledge of these matters. What took place in the different interviews between these witnesses and the attorney and the detective was fully brought out on cross-examination. The evidence fails to show that their testimony was induced by threats or intimidation. Nor was there any promise of immunity further than a reading to Tupper of § 30 of article 2 of the state constitution, which is in part as follows:

"Any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery or corrupt solicitation, or practice of solicitation, and shall not be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy, but such testimony shall not afterwards be used against

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him in any judicial proceeding, except for perjury in giving testimony."

While these witnesses in their own minds may have hoped, and doubtless did hope, to place themselves in a better position with the authorities by making a clean breast of the bribery matter, and were advised that their evidence could not be used against themselves, the evidence fails to show that any improper influence was brought to bear as an inducement to their testimony.

There was evidence proper to go to the jury and tending to establish every element of the crime charged in the indictment. The weight and credibility of this evidence was for the jury. The trial court did not feel warranted in directing a verdict for the defendant nor in granting a new trial. In such cases, we have uniformly declined to interfere. To do so would be a plain usurpation of the functions of the jury.

"It is difficult to formulate a general rule stating the extent to which appellate courts will pass upon the weight and sufficiency of evidence and reverse because of an insufficiency of evidence, but the general rule seems to be that where there is material evidence tending to prove defendant's guilt before the jury, and the trial court refuses to set their verdict aside, an appellate court will not reverse the action of both the trial court and the jury; that it will examine the record to see whether there is evidence proper to go to the jury, and upon which a verdict of guilt might reasonably be founded, and, being satisfied on that point, will refuse to interfere, whatever may be its own opinion of the weight or preponderance of the evidence. If, however, the verdict of the jury is altogether unsupported by any evidence whatever, or if it is against the evidence and every proper inference which is reasonably deducible therefrom, the judgment will be reversed by the appellate court." 12 Cyc. pp. 906, 907, 908.

See, also, *State v. Bailey*, ante p. 336, 121 Pac. 821; *State v. Bailey*, 31 Wash. 89, 71 Pac. 715; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 867; *State v. Coates*, 22 Wash. 601, 61 Pac. 726;

Miller v. Territory, 9 Ariz. 123, 80 Pac. 321; *Kennon v. Territory*, 5 Okl. 685, 50 Pac. 172; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *People v. Williams*, 133 Cal. 165, 65 Pac. 323.

(6) It is contended that the instruction given by the court defining reasonable doubt was erroneous. The instruction as a whole was as follows:

"The burden is on the state, and in order to convict, the state must satisfy you beyond every reasonable doubt that the defendant accepted from Tupper, about the time mentioned, some amount of money as a reward or bribe as herein defined.

"Under our law, a person accused of crime is presumed to be innocent, and he is entitled to the benefit of this presumption throughout this trial until the same shall have been removed or overcome by proof of guilt beyond every reasonable doubt.

"Now what is reasonable doubt? When is a doubt a reasonable doubt? Failure of jurors to understand this term sometimes results in conviction on insufficient evidence, and sometimes results in acquittal in spite of ample proof of guilt.

"It is not enough that the state satisfy you by a mere preponderance of the testimony; that is, it is not enough that you shall believe from the evidence that in all probability the defendant is guilty. That is the rule in civil cases; but while you may believe the defendant in a criminal case to be in all probability guilty, yet there may be a reasonable doubt in your mind. On the other hand, a reasonable doubt does not mean a vague, conjectural doubt or a misgiving founded upon some mere possibility. You should understand and distinguish the difference between proof beyond a reasonable doubt and proof to the exclusion from the mind of a mere vague, imaginary or possible doubt. The state is not required to satisfy you of guilt so conclusively and to such an absolute certainty that there is no possibility of any mistake whatever. But when you are morally satisfied, then you are satisfied beyond a reasonable doubt. You may be satisfied of a fact beyond every reasonable doubt and yet not satisfied to an absolute certainty. You may have no reasonable doubt in your mind of the truth of a matter, and yet

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there may be a possibility that such matter is not true. Very few facts in the domain of human knowledge are susceptible of proof to an absolute certainty. Look carefully in your own mind and if you can say 'I have no reasonable doubt about such matter, I am morally certain of its truth,' then you should act upon your conviction of such being the truth, notwithstanding the mere possibility that you may be mistaken.

"Hence, you note a reasonable doubt is one that must arise from the evidence in the case, and must be such a substantial one as an honest, sensible and fair-minded man might with reason entertain consistently with a conscientious desire to ascertain the truth. Use your common sense as men of experience possessing some knowledge of human nature and of worldly affairs, and if after examining carefully all the facts and circumstances in this case you cannot say and feel that you have a settled and abiding conviction of the guilt of defendant, then you have a reasonable doubt and should acquit; if you have such conviction, then you have no reasonable doubt, and should convict."

Counsel's objection to this instruction is elusive. It is directed mainly to isolated sentences, particularly the following: "But when you are morally satisfied, then you are satisfied beyond a reasonable doubt," and "Look carefully in your mind and if you can say 'I have no reasonable doubt about such matter, I am morally certain of its truth,' then you should act upon your conviction of such being the truth," etc. The apparent contention is that this language would allow the jury to determine the question of reasonable doubt or the contrary "without any reference to evidence or lack of evidence." A reading of the whole instruction is sufficient to refute this view. The court having first instructed clearly as to burden of proof, the presumption of innocence and the difference in the rule as to the quantum of proof in civil and criminal cases, followed the language complained of with the plain statement that "a reasonable doubt is one that must arise from the evidence," and in effect that, whatever the conclusion reached it must rest upon "all the facts and circumstances in this case." While the sentences complained of

would doubtless be prejudicially erroneous standing alone, they cannot be so held when taken in connection with the remainder of the instruction. It is hardly practicable to include every element of a charge in a single sentence. It is sufficient if the instruction as a whole fairly states the law. We have so often so held that citation of authority seems unnecessary.

No profit would result from a review of the numerous authorities cited in this connection, since some of them indulge a refinement of criticism almost scholastic and none of the instructions considered is couched in the same or language equivalent to that here under examination save one. In *Gorgo v. People*, 100 Ill. App. 130, which is cited by appellant with approval, the instruction was as follows:

“A reasonable doubt is that state of mind which, after a full consideration and comparison of all the evidence, both for the state and the defense, leaves the minds of the jury in that condition that they can not say that they feel an abiding faith, amounting to a moral certainty, from the evidence in the case, that the defendant, Vito Gorgo, is guilty of the charges as laid in the indictment. If you have such a doubt, if your conviction of the defendant's guilt, as laid in the indictment, does not amount to a moral certainty from the evidence in this case, then the court instructs you that you must acquit the defendant, Vito Gorgo.”

It will be noted that this instruction does not differ materially from the instruction here questioned except in the position therein of the reference to the evidence. The two instructions contain substantially the same elements expressed in different language and in different arrangement. See, also, *State v. Harsted*, 66 Wash. 158, 119 Pac. 24, in which case we approved an instruction essentially the same as that here considered. The instruction is not objectionable because it uses the words “morally certain” as equivalent to “beyond a reasonable doubt.” That these terms are legal equivalents of each other is supported by ample authority. *Gorgo v. People*, *supra*; *Jones v. State*, 100 Ala. 88, 14

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South. 772; *Miles v. United States*, 103 U. S. 304; *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Territory v. Owings*, 3 Mont. 137; *Hornsby v. State*, 94 Ala. 55, 10 South. 522; *People v. Cheong Foon Ark*, 61 Cal. 527; *Loggins v. State*, 32 Tex. Cr. 364, 24 S. W. 512.

(7) It is also contended that the court committed error in giving the following instruction:

“If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of any witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies, or such points of difference, affect the main issue in this case. Examine such discrepancies or inconsistencies and such disputed points; look at the same squarely, and ask yourselves these questions: How does the decision of this, or that, or the other discrepancy, or matter in dispute, affect the main issue in this case? Regardless of what may be the truth of such discrepancy or issue, did or did not the defendant accept a bribe from Tupper and Gerald? Is such discrepancy or such disputed point material to establish this main and material fact? If they are not material, if the decision of the same is not necessary to enable you to arrive at the truth of this main issue, then such discrepancies or disputed points are immaterial and minor matters, and do not waste further time in discussing or considering them. Spend no time in the discussion of minor matters which, whether true or false, do not affect and are not necessary to enable you to answer the important question: Did defendant accept a bribe from Tupper and Gerald?”

It is argued that this instruction tended to eliminate from the consideration of the jury many disputed and material facts. We think not. The purpose of the instruction was plain. It was a mere caution to the jury against being led afield and unduly influenced by discrepancies or inconsistencies which had no bearing upon the main issue in the case, namely, the guilt or innocence of the defendant. They were instructed to examine each discrepancy with that issue in view. The testimony in this case is very voluminous. In

such a case, there is always danger of the jury becoming hopelessly involved in a maze of collateral issues. A caution to examine every discrepancy, inconsistency, and disputed point with a view only to its bearing upon the real issue, and to waste no time upon any such matter when found immaterial to that issue, was entirely proper. It took no fact from the jury. The jury was told to examine every such discrepancy or inconsistency till it was found immaterial. In prior instructions the court had clearly defined the issue. In a subsequent instruction the jurymen were told that they were the exclusive judges of the evidence, of the credibility of the witnesses and of the degree of weight to be attached to their testimony, and to give to the testimony of every witness just such weight or value as they might think it entitled to. The instruction complained of, taken in connection with the others given, was not objectionable.

(8) Finally, it is contended that the court erred in refusing to give instructions requested by the defendant as to the weight to be given to the testimony of an accomplice and as to the necessity for corroboration of such testimony. These requests were based upon an assumption that Gerald and Tupper were accomplices of the defendant in the commission of the offense charged. They were not accomplices within the legal significance of that term. The appellant was charged with accepting a bribe from Gerald and Tupper, and as an element of the offense, the corrupt agreement between the three was alleged. The corrupt agreement itself constituted an independent crime, that of conspiracy. If the defendant had been indicted for conspiracy, then Gerald and Tupper would have been accomplices in that crime. The conspiracy, however, was not a conspiracy to bribe an officer but to conduct houses of prostitution in violation of law. While proof of the conspiracy was necessary as an element of the offense as charged, it was not the offense charged. The gravamen of the offense was soliciting and accepting a bribe. The giving or offering of a bribe, and the soliciting or re-

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ceiving of a bribe, are two distinct crimes, defined and made punishable by separate sections of the statute. These sections, so far as here material, are as follows:

“Every person who . . . shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as hereinbefore specified, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.” Rem. & Bal. Code, § 2320.

“Every executive or administrative officer or person elected or appointed to an executive or administrative office who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion or action upon any matter then pending, or which may by law be brought before him in his official capacity, shall be influenced thereby; . . . shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both.” Rem. & Bal. Code, § 2321.

The prosecution was based upon the latter of these sections, and it is plain that neither Tupper nor Gerald could have been indicted under that section or for the crimes therein defined, either as principal or accessory. This is obvious, since the section applies only to public officers, and the statute itself in the prior section has declared the acts of which Tupper and Gerald were guilty to constitute a separate and distinct crime. The true test to determine whether a witness is an accomplice or not is, Could the witness himself have been indicted, either as principal or accessory, for the crime charged and under investigation? If he could not, he is not an accomplice. Manifestly, under that test, Tupper and Gerald were not accomplices; neither had received a bribe; neither was a public officer. The supreme court of Minnesota, in passing upon this exact ques-

tion, and in connection with a crime charged under a statute containing sections closely analogous to those above quoted has so held. (Minnesota Statutes 1894, §§ 6349, 6355, embodied in a modified form in Revised Laws of Minnesota 1905, §§ 4799, 4800.) In *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127, it appeared that Durnam was indicted for soliciting a bribe from one Richards with the understanding that Durnam's vote as a member of the city council would be influenced thereby. The court said:

"The court refused to give to the jury certain requested instructions upon the proposition that a conviction cannot be had upon the uncorroborated testimony of an accomplice. These requests were made upon the theory that Richards, or both Richards and Halvorson, were accomplices of the defendant in the commission of the offense charged, or at least that there was evidence tending to prove that fact. If there is any evidence tending to implicate Halvorson or Richards, even morally, with the crime charged, the most that can possibly be claimed for it is that it tended to prove that they were inclined to entertain defendant's demand favorably, and would have been willing to accede to it if the sum demanded had not been so large.

"Even if they had fully acceded to defendant's demand, and had paid or offered to pay the sum demanded, although they would have been guilty of an independent and separate crime, they would not have been, within the meaning of the law, accomplices of the defendant in the commission of the crime of asking for a bribe. An accomplice in legal signification, is one who co-operates, aids or assists another in the commission of a crime, either as principal or accessory. The general test to determine whether a witness is or is not an accomplice is, could he himself have been indicted for the offense either as principal or as accessory? If he could not, then he is not an accomplice. *Com. v. Wood*, 11 Gray 85. Each of the two parties to a transaction may be guilty of a crime, and yet, if the two crimes are separate and distinct crimes, the one is not the accomplice of the other. Thus, suppose A. asks B. for a bribe, and B. pays it. A. is guilty of the crime of asking a bribe, and B. of the crime of giving one. But the two crimes are entirely distinct, and neither party could be indicted, either as principal or accessory,

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for the crime committed by the other. Such a case would not be within the statute forbidding a conviction on the uncorroborated evidence of an accomplice, although, of course, the moral delinquency of either, if called as a witness against the other, would be a fact going to his credibility, which a jury should take into consideration."

In *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370, similar statutory provisions are construed in the same way. Section 86 of the penal code of California punished as a crime the asking for or receiving of bribes by members of the legislature. Section 85 punished as a crime the giving of a bribe. The question was, Were the witnesses, the persons furnishing the bribe money to a go-between, accomplices? The court said:

"It is very evident from an examination of the two sections mentioned that it was the intent and purpose of the legislature to make offering to give, or giving, a bribe an offense, whether the legislator asked for and received it or not. And it seems quite as evident that it was never intended that persons concerned would be interchangeably guilty as accomplices, when the offer was accepted and the bribe received. In such event the giving would be the crime committed by one party, and the taking the crime of the other. As the only acts of these witnesses which could by possibility render them liable as principals under section 31 of the penal code constitute a separate and distinct offense under section 85, cardinal rules of construction forbid an interpretation which would also make them accessories before the fact, or principals in the commission of the other offense defined in section 86 of the same code."

See, also, *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48.

Analogous situations are found in the following cases. Where, by separate sections of the statute, buying lottery tickets and selling lottery tickets are made separate crimes, the buyer is not an accomplice of the seller. *Boyd v. Commonwealth*, 141 Ky. 247, 132 S. W. 423. In the absence of a statute requiring corroboration in such cases, where by one section of the criminal code the performing of an abor-

tion is made an offense, and by another section it is made a different crime for the woman to submit to the act, the woman is held not an accomplice of the person actually performing the operation. *People v. Meyers*, 5 N. Y. Cr. Rep. 120; *State v. Stafford*, 145 Iowa 285, 123 N. W. 167. "The woman upon whom the attempt is made with her consent is not an accomplice in such sense that her testimony requires corroboration; but the woman may be an accomplice in such sense that her admissions or declarations are admissible against the defendant as those of a confederate." 2 McLain, Criminal Law, § 1151. So, also, it has often been held that in prosecution for the unlawful sale of liquor, the person who buys at such illegal sale is not an accomplice of the seller. Such person is not a participant in the act of selling, which is the crime charged. *Harrington v. State*, 36 Ala. 236; *State v. Baden*, 37 Minn. 212, 34 N. W. 24; *People v. Smith*, 28 Hun 626; *Sears v. State*, 35 Tex. Cr. 442, 34 S. W. 124; *Trinkle v. State*, 60 Tex. Cr. 187, 131 S. W. 583; *State v. Wright*, 152 Mo. App. 510, 133 S. W. 664.

Section 2007 of Rem. & Bal. Code, abolishing the distinction between principals and accessories, and § 2260, Rem. & Bal. Code, defining as principals all participants, which are relied upon by the appellant, are not controlling on the situation here presented. These sections are general in their terms, and are manifestly intended to meet cases not otherwise specifically provided for by statute. They have no application to acts which are, by specific and distinct statutes, expressly designated and made subject to punishment as primary crimes in themselves. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364.

Any attempt to review all of the authorities cited by the appellant would extend this opinion without corresponding profit to an unwarranted length. A clear distinction between the case here and many of those cited lies in the fact that the crime charged was, in its very nature, such that the witnesses Gerald and Tupper could not have committed it,

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and could not have been indicted for it. They did not come within the class of persons included in the definition of the crime. Not being subject to indictment for the crime charged, they were not accomplices within the meaning of the rule requiring corroboration of their testimony. Those cases holding to the contrary seem to us as not logically sound. We have examined the instructions given by the court, and we are of the opinion that they correctly stated the law as applied to the evidence.

The principal instruction requested by the appellant was taken from *State v. Pearson*, 37 Wash. 405, 79 Pac. 985. In that case, Pearson, Wilson and Lewis Haley were jointly charged with stealing cattle. The witness John Haley had been convicted from another county for stealing these same cattle, the claim of the state being that the stealing was the joint act of John Haley and the parties charged. It is thus evident that John Haley was an accomplice of the other three. The court said:

“While we do not now announce the doctrine that a conviction should be permitted in no case on the uncorroborated testimony of an accomplice, nevertheless we do hold that the trial court should carefully caution the jury in such cases in the matter of weighing such testimony, and should warn it against a conviction on such uncorroborated testimony. We think the refusal of the trial court to give the fifth instruction above set forth, which was requested by appellant, was reversible error.”

In that case, we did not hold that in no case would a conviction be sustained on the uncorroborated testimony of an accomplice; much less, that a conviction could not be sustained on the uncorroborated testimony of one not in law an accomplice though closely connected with the crime. The same is true of the case of *State v. Jones*, 53 Wash. 142, 101 Pac. 708. In this connection, it may be again noted that the doctrine of invariable necessity of corroboration has been much further relaxed in the recent case of *State v. Stapp*, *supra*. In any event, the cases cited are not ap-

plicable here. The witnesses Gerald and Tupper were not accomplices.

We have considered the record with much care. We find no error therein justifying a reversal.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and MORRIS, JJ.,
concur.

[No. 9575. Department One. March 19, 1912.]

ERNEST DAVIES *et al.*, Respondents, v. THE CITY OF SEATTLE
et al., Appellants.¹

MUNICIPAL CORPORATIONS — EIGHT-HOUR DAY — LABOR BY TEAMSTERS. Rem. & Bal. Code, § 6575, providing that all work by contract or day labor done for the state or any of its political subdivisions, shall be performed in work days of not more than eight hours a day, is violated by requiring city teamsters to harness and hitch their teams, collect their tools, and be at the place of work before the legal day begins, so as to put in eight hours "on the job," and thereafter return to the barn and unhitch and unharness their teams, putting in about an hour in excess of the lawful eight-hour day.

INJUNCTION—ADEQUATE REMEDY AT LAW—VIOLATION OF EIGHT-HOUR DAY LAW. There is no adequate remedy at law and injunction lies to prevent the city from violating the eight-hour day law, where it employed many teamsters and required them to work in excess of eight hours a day or "quit the job," the employment being mutually satisfactory and agreeable; and the city is not prejudiced by the form of the decree, even if there is a remedy by mandamus.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 27, 1911, upon findings in favor of the plaintiffs, in an action for an injunction. Affirmed.

Scott Calhoun and James E. Bradford, for appellants.

C. R. Hawkins and Edward Judd, for respondents.

¹Reported in 121 Pac. 987.

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GOSE, J.—Plaintiffs, at the time of the filing of this bill, were employed by the city of Seattle as teamsters, and as such were performing day labor in the street department of the city. The bill alleges that the city was then employing a great many teamsters in the street department as day laborers; that they were so numerous that it was impracticable to unite all of them in the action; that the wrongs for which redress is sought are common to all the men so employed, and that the action was prosecuted for the common benefit of all such employees. The bill further alleges that the defendants, the city of Seattle, its board of public works, and its superintendent of streets, for more than sixty days prior to the commencement of the action, had required and then required the plaintiffs and all other teamsters employed by the city as day laborers in street work, to work more than eight hours each day. The prayer is that the city, its officers and agents, be permanently enjoined from requiring the performance of more than eight hours' labor per day by the plaintiffs and all others on whose behalf the action is prosecuted. The defendants answered and denied that the plaintiffs were required to work more than eight hours per day. There was a decree for the plaintiffs. This appeal followed.

The record discloses without controversy that the city maintains five or six barns and owns its teams; that all teamsters performing day labor for the street department of the city (except as hereinafter noticed) are required to go to the barn each morning where their respective teams are kept, grease their wagons when necessary, harness and hitch their teams, collect their tools, and be at the place of work or, as the witnesses put it, "on the job," at eight o'clock a. m. and that after working eight hours "on the job," they are required to return the teams to the barn and unhitch and unharness them. The appellant Walters, the superintendent of the street department of the city, testified that harnessing and hitching the team, driving it to the place where the work was to be done, and returning it to the barn and unhitching

it after the teamster had put in eight hours' time on the work, would ordinarily consume about one hour each day. It further appears that, where the distance between the barn and the work is so great as to require more time going to and returning from the work, the city bears that burden.

Respondents' cause of action is based upon the statute, Laws of 1903, page 51 (Rem. & Bal. Code, § 6575 *et seq.*). Section 1 of this act, so far as applicable to the case at bar, is as follows:

"It is a part of the public policy of the state of Washington that all work 'by contract or day labor done' for it, or any political subdivision created by its laws, shall be performed in work days of not more than eight hours each, except in cases of extraordinary emergency."

The statute is so clear in its meaning and so free from ambiguity that it requires no construction. It means what it says, viz., as applied to the case at bar, that no day laborer shall be required to work more than eight hours a day except in cases of extraordinary emergency, and none is claimed in this case. The appellants offered evidence to the effect that, in the cities of Seattle, Tacoma, Spokane, Everett, and Bellingham, a custom has obtained since the enactment of this law, requiring teamsters to work eight hours a day "on the job.". This testimony was offered, not for the purpose of showing a custom in conflict with the statute, but as an aid to its interpretation. In all these cities, a teamster is required to harness and hitch his team, drive it to the work, work for eight hours "on the job," and then return his team to the barn and unhitch and unharness it. In Everett the additional burden of grooming the team is put upon the teamster. These witnesses justified the custom by saying that the excess time put in by the teamster is not work but, as they variously termed it, "choring" or "preparing for the day's work." Such construction is a palpable evasion of the law. The statute is so clear in its provisions that it requires no such aid in its interpretation. The respondents

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are only asking that it be obeyed. It would seem, as the learned trial court observed at the close of the trial, that there could not be two opinions as to whether the respondents were working more than eight hours a day. If the excess time put in by the respondents was not work, then the inquiry is, what is work and where is the dividing line?

The argument *ab inconvenienti* is put forth. This argument has no place before a court where the meaning of the statute is clear. Such argument may be persuasive before the law-making branch of the government.

The appellants next contend that the respondents have other remedies, and that they can have no injunctive relief. In this state there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, and it is called a civil action. Rem. & Bal. Code, § 153. The rule, however, has been adopted in this state, as in most of the sister states, that injunctive relief will not be granted where there is a plain, complete, speedy, and adequate legal remedy. As was said in *Phelan v. Smith*, 22 Wash. 397, 61 Pac. 31: "Incompleteness and inadequacy of the legal remedy are what determine the right to the equitable remedy of injunction." The same view is announced in *Grant v. Cole*, 23 Wash. 542, 63 Pac. 263. In *Davis v. Wakelee*, 156 U. S. 680, it is said:

"It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. . . . Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

"It is not enough that there is a remedy at law. It must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." 16 Am. & Eng. Ency. Law (2d ed.), 355.

One of the respondents testified that, when the teamsters protested against the rule requiring them to work more than eight hours a day, the sub-foreman answered that it was a

general order, and that they could comply with it or "quit the job."

The appellants argue that section 12, art. 16, of the city charter furnishes the respondents an adequate remedy. It suffices to say that it applies only to employees who have been discharged. It is further argued that mandamus is the proper remedy. The respondents stated the facts upon which they relied in their bill. If they were entitled to the relief obtained, viz., to be relieved from working more than eight hours a day, the city is not prejudiced by the form of the decree.

The appellants have cited authorities to the effect that an employee, whether in the service of a municipal corporation or an individual, cannot maintain an action in equity to restrain his employer from discharging him. That this is the general rule may be granted. But it has no application to the case. The record shows that the respondents were content to remain in the service of the city, and that the city was satisfied with their service. The employment was mutually satisfactory and agreeable. If the appellants' contention should be upheld, the respondents would be required to continue to work more than eight hours a day or "quit the job." The law places no such alternative upon them.

It is finally said that the decree is too broad. When the record is read as an entirety, the decree operates only in favor of teamsters in the employ of the city as day laborers upon street work, driving the city's teams.

The decree is affirmed.

DUNBAR, C. J., PARKER, CROW, and CHADWICK, JJ., concur.

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[No. 9497. Department One. March 20, 1912.]

C. HOFSTETTER, *Appellant*, v. SOUND TRUSTEE COMPANY
et al., *Respondents*.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, when sustained by a preponderance of the evidence.

COSTS—WITNESS FEES. Under Rem. & Bal. Code, § 482, witness fees may be taxed for witnesses who were not subpoenaed or called, where they were in attendance at the trial, but not used because the course of the trial made their use unnecessary.

Appeal from a judgment of the superior court for King county, Sheeks, J., entered January 27, 1911, upon findings in favor of the defendants, in an action for a receiver of a corporation. Affirmed.

L. H. Wheeler, for appellant.

Ballinger, Battle, Hulbert & Shorts, for respondents.

CHADWICK, J.—Appellant and respondents William H. Angel, Daniel Hickey, and many others, were subscribers to a concern called the Income Guaranty Company. The promise of quick riches was the lure that held this concern together. Those who subscribed to it were to be paid in the order of their subscriptions two dollars for every dollar invested. The concern had no capital and no property. The money was paid out of the sums received from new subscribers and from lapses. In January, 1906, it became apparent to some of those who were subscribing to the scheme that its end was approaching. Two circumstances contributed to this result: hard times and the activity of the agents of the United States government which from time to time has acted upon the assumption that all men are not *sui juris*. It accordingly was about to exercise its right of paternal interference to protect the genus *Catostomidae* from the more

¹Reported in 122 Pac. 6.

active Carchariidae. At this time appellant had a net sum of \$508 in the get-rich-quick concern. It seems clear, beyond the peradventure of a doubt, that he understandingly, and with other subscribers, agreed to put into a new concern to be organized a sum equal to ten per cent of the amount he had paid into the Income Guaranty Company, and that all such subscribers would take stock in the new concern, representing a number of shares at one dollar per share, equal to the amount they had paid into the Income Company. In other words, those who went into the new concern were to get their stock for ten cents on the dollar. Appellant's actual investment in the new concern was \$58.

The Sound Trustee Company, the respondent, was accordingly organized. So far as the record shows, this was and is a legitimate company, having no connection in any way with the former company; nor does it bear any relation to the new company except in this, that it served to bring about a combination of the individuals who had subscribed thereto. The new company organized, and has done quite an extensive business. Considerable new money has been brought into it, and it has some resources in real estate, and some debts. Appellant brought this action upon the theory that the Sound Trustee Company is obligated to pay him the amount of his investment in the old company, regardless of the present value of his stock in the respondent; basing his demand for an accounting and a receiver upon the allegations that Angel and Hickey represented to him, at the time that he agreed to pay in his ten per cent, that respondent had a capital stock of \$150,000 fully paid and nonassessable; that the business has been fraudulently conducted; and that the respondent company is insolvent.

We shall not review the evidence. Suffice it to say that, in our judgment, appellant has failed to sustain any of these issues by a preponderance of the evidence, or any evidence. The errors assigned are numerous, and almost without exception go to the refusal of the court to admit testi-

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mony or to compel the production of testimony. A careful reading of the statement of facts convinces us that the trial judge was indulgent in the extreme, and offered appellant every opportunity to make proof of his case within the well-understood rules of evidence. Appellant did not see fit to meet the suggestion of the court, and is bound by the record as made and by the findings of the court in the few instances where it might be contended that the testimony is conflicting.

It is further complained that certain witnesses, who were not subpoenaed and not called as witnesses, were allowed their witness fees. It is said that a witness cannot recover fees unless his attendance is compulsory. It has long been the rule in this state, under § 482, Rem. & Bal. Code, that the time and mileage of a witness who is in attendance at the trial, although not subpoenaed, may be taxed as costs, where, as it seems to have been in this case, the course of the trial makes the use of such witnesses unnecessary. *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009.

Judgment affirmed.

GOSE, PARKER, and CROW, JJ., concur.

[No. 10166. Department One. March 20, 1912.]

THE CITY OF SPOKANE, *Appellant*, v. WILLIAM H. COWLES
et al., *Respondents*.¹

EMINENT DOMAIN—APPEAL—RIGHT TO APPEAL—WAIVER—PAYMENT OF AWARD—CESSATION OF CONTROVERSY. A city cannot, after paying an award in condemnation proceedings into court, appeal therefrom, as the controversy has ceased, in view of Rem. & Bal. Code, § 7783, providing that an award of damages in condemnation proceedings shall be final unless appealed from, making payment of the amount into court an indispensable condition of possession of the property, and providing that after payment, the city shall be liable to the owners for any further compensation which may be

¹Reported in 121 Pac. 463.

finally awarded to the parties appealing, and that acceptance of the sum awarded shall waive the right to appeal, whereupon final judgment may be rendered as in other cases, and Id., § 7784, providing that, upon payment of the award, title shall vest in the city, and Const., art. 1, § 16, prohibiting the taking of private property until compensation therefor in money shall be first ascertained and paid into court.

Motion to dismiss an appeal from a judgment of the superior court for Spokane county. Granted.

F. M. Dudley and Cullen & Lee, for appellant.

Merritt, Oswald & Merritt, for respondents.

CHADWICK, J.—The city of Spokane granted a franchise to the Chicago, Milwaukee & Puget Sound Railway Company, to lay its tracks along one of its streets. By the terms of the franchise, it was agreed that, inasmuch as the plan of the company would require a change of grade, the city would institute and prosecute all actions that might be necessary for the purpose of ascertaining and settling the damages to abutting property owners. It was further agreed that all damages and costs, excepting attorney's fees, should be paid by the railway company. The proceeding was accordingly begun, resulting in a judgment in favor of certain property owners; among others, H. W. Boone and wife and the Merrick Investment Company, a corporation. After the entry of the judgment, the railway company paid into the registry of the court the full amount awarded to the property owners named. Thereafter the city gave notice of appeal. Boone and wife and the Merrick Investment Company have appeared here and moved to dismiss the appeal.

The grounds of the motion are that the city of Spokane has no interest in the judgment which would entitle it to appeal after the payment of the award to the clerk of the court by the real party in interest; and further that, if the city could not be affected in any way by the judgment, it has no right of appeal under the statutes of this state. Mr. Dud-

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ley, attorney for the railway company, has filed an affidavit in resistance of the motion, in which he says:

"That said payment was so made under the advice of affiant, to the end that the city of Spokane might proceed without delay with the work of elevating the grades of Front avenue and Division street, and in order to enable it so to do. That it was no purpose of the said railway company, or of the said city of Spokane by said payment to waive any right of appeal in said cause. That the said railway company requested the city of Spokane to take the appeal which is being prosecuted in this action, and said appeal is being prosecuted in the interest of the said city of Spokane and of said railway company."

Section 7783, Rem. & Bal. Code, after declaring the effect of a judgment in this class of cases, provides:

"Such judgment or judgments shall be final and conclusive as to the damages caused by such improvement unless appealed from, and no appeal from the same shall delay proceedings under said ordinance, if such city shall pay into court for the owners and parties interested, as directed by the court, the amount of the judgment and costs, and such city, after making such payment into court, shall be liable to such owner or owners or parties interested for the payment of any further compensation which may at any time be finally awarded to such parties so appealing in said proceeding, and his or her costs, and shall pay the same on the rendition of judgment therefor, and abide any rule or order of the court in relation to the matter in controversy. In case of an appeal to the supreme court of the state by any party to the proceedings the money so paid into the superior court by such city, as aforesaid, shall remain in the custody of said superior court until the final determination of the proceedings. If the owner of the land, real estate, premises, or other property accepts the sum awarded by the jury or the court, he shall be deemed thereby to have waived conclusively an appeal to the supreme court and final judgment may be rendered in the superior court as in other cases."

Art. 1, sec. 16, of the constitution is in part as follows:

"No private property shall be taken or damaged for public or private use without just compensation having been first

made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law."

It is the theory of the appellant that, having paid the money into court for the owner, an appeal will lie under the section of the statute hereinbefore quoted.

Mr. Lewis, in the latest edition of his work on Eminent Domain, § 807, says:

"If the petitioner pays the damages awarded, this will, in the absence of any statute, waive an appeal, but the deposit of damages for the purpose of obtaining possession will not deprive the petitioner of the right of appeal."

Many cases are cited to sustain the text, but reference to them will disclose the hardihood of the author in attempting to lay down any hard and fast rule; for, without exception, the cases are made to depend in their final analysis upon local statutes and constitutional provisions. Unless this is kept clearly in mind, the authorities would seem to be chaotic. A review of them would serve no purpose in this opinion.

Under the authorities, we have no doubt that the legislature might have provided that, in so far as the acquisition of a right of way is concerned—and this term would probably include the right to acquire a street or to put an added burden upon a street—the city might appeal from the judgment without forfeiting the right to take possession of the property and prosecute its work pending an appeal. It will require no more than a casual review of the authorities, however, to detect the principle upon which the courts have seemingly favored municipalities in this regard. It is that, in such cases, the municipality is not and should not be required to pay the compensation into court as a condition precedent to possession; for it is understood that cities and

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towns must raise their revenue by taxation, and that a judgment in an eminent domain proceeding operates as a lien upon all the property of the taxing district, and will be surely paid in due course. This, it is held, satisfies the constitutional provision that property shall not be taken without just compensation. But it will be noticed that our statute does not go to the same extent. It provides for payment unconditionally. In so far as payment goes, it leaves the city in the same situation that a public service corporation would be in if it were prosecuting a like proceeding. It has made the payment into court an indispensable condition of possession. The statute is final in so far as the city is concerned. It provides for the payment of such *further* compensation as may be allowed *over* the amount paid in, indicating that the only issue on a new trial would be the question whether a *greater* sum should be awarded. Again, § 7784 provides that, upon payment of the award—and this, we think, means the payment referred to in § 7783—title shall vest in the city. Thus construed, the meaning of these statutes is simple enough. It is that the fund is substituted for the property, and may be withdrawn by the owner if he desires to do so. It is a payment within the meaning of the statute and the constitution. Title to the property passes to the city. Title to the money, if the owner sees fit to accept it, passes in virtue of his acceptance.

The necessity for the present statute was well understood by the profession at the time of its passage. It was to give the city the right to pay the compensation, take possession, and proceed with its work, provided the owner refused payment when tendered or was unknown. The rights of the parties are mutual, and so far as our law is now written, the right to possession follows, and cannot precede, payment of compensation to the owner, or into the registry of the court for his use. Payment by the condemning party, as the term is used in the constitution and the statute, means an affirmation of the judgment. The right of the landowner cannot

be frittered away so as to allow a condemning party to make a deposit of the award in court and then take possession, leaving to the claimant the burden of a lawsuit. It was to avoid the oppression of continued litigation at the instance of the condemner that provision for payment was made. The difference between payment into court and the mere deposit of the money is vital. By a deposit, an owner is deprived of the use of his property and of the rents, issues, and profits flowing therefrom. The money lies in court at the risk of the landowner, but without profit to him; and in case of its loss or embezzlement, the condemner would be exonerated and the property owner put to the possibility of further litigation. A deposit is not a payment. It is not what the constitution or statute says, nor what they intend. If the claimant is not satisfied, he may appeal, thus taking upon himself the burden of continued litigation. If, on the other hand, the municipality is satisfied, it may manifest that satisfaction by paying the money into the clerk of the court when payment is refused by the landowner.

Keeping in mind, then, the present state of the law, to hold that a city can pay the award into court, and thereupon take possession pending an appeal by it and possibly another trial, would be to take private property without "compensation first made or paid into court" for the owner; or, in other words, a city, like any other condemner, cannot take private property while maintaining an attitude of hostility toward the owner. Reference to the constitutional provisions throughout the several states will show that the constitution of this state is most positive in its declaration of the right of the landowner; and while, as we have said, it was within the power of the legislature to favor the municipalities to a certain degree, it has not done so, and we are constrained to hold that the city can take property only when compensation has been ascertained and paid.

While our ruling may not seem to be in harmony with the cases cited by Mr. Lewis, it is because they rest upon express

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statutes, or the courts have found that the legislature has made exceptions, or the constitution and statutes will bear a construction in favor of municipalities such as we have pointed out in this opinion. So in the case at bar, the city having paid the award and taken possession, and no appeal being prosecuted by the claimant, it follows that the judgment is "final" and nothing remains to engage the attention of the court.

Appeal dismissed.

DUNBAR, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 10048. Department One. March 20, 1912.]

G. A. C. ROCHESTER, *as Administrator etc., Appellant*, v.
SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY,
Respondent.¹

DEATH—ACTIONS—DAMAGES—AFTER MAJORITY OF HEIR—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 183, providing that in actions for wrongful death on behalf of the widow or children, the jury may give such damages as under all the circumstances of the case may to them seem just, a minor son is entitled to recover for the death of his father such pecuniary loss as the evidence showed he would sustain after his majority; especially in view of the amendment of 1909, adding to the beneficiaries of the statute, parents, sisters and "minor" brothers dependent upon the deceased for support; and the evidence justifies an instruction to that effect where the son was normally defective and the father was not an immoral or improvident man or in bad health.

Appeal from an order of the superior court for King county, Ronald, J., entered June 7, 1911, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff in an action for wrongful death. Reversed.

Peters & Powell, for appellant.

Morris B. Sachs, for respondent.

¹Reported in 122 Pac. 23.

GOSE, J.—This action is prosecuted by the administrator of the estate of W. C. Bell, deceased, for the recovery of damages sustained by his heirs in consequence of his death, which it is alleged was caused by the negligence of the defendant. There was a verdict for the plaintiff for \$17,500. The court granted a new trial upon the sole ground that he had erred in instructing the jury that, in estimating damages, they could include such pecuniary loss as they might find from the evidence the minor son of the deceased would suffer after attaining his majority by reason of his father's death. The motion for a new trial was denied in all other respects. The plaintiff has appealed from the order granting a new trial.

On April 30, 1910, the respondent was operating an electric railway in the city of Seattle and between that city and the town of Renton. On the date stated, the appellant's intestate lost his life in consequence of a collision between the respondent's passenger car upon which he was riding and one of its freight cars. At the trial of the case, the negligence of the respondent was conceded, and the single question submitted to the jury was the measure of damages. The decedent was forty-six years of age at the time of his death, and his sole heir is a son, fourteen years of age, who is not of normal mentality. He was a lawyer by profession, a resident of Harrodsburg, Kentucky, and had voluntarily retired from the circuit court bench of that state a few months before his untimely death, after having served a term of six years.

The single question presented by the appeal is whether the court erred in instructing the jury that they could allow such pecuniary loss as the evidence showed the son would sustain, after his majority, from the father's death. The cause of action is based upon the statute, Rem. & Bal. Code, § 183. The applicable part of the statute is as follows:

"When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representa-

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tives may maintain an action for damages against the person causing the death. *If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent on him for support and who are resident within the United States at the time of his death, may maintain said action.* . . . In every such action the jury may give such damages, as under all circumstances of the case may to them seem just."

The old statute, Bal. Code, § 4828, was amended by Laws of 1909, page 425, by adding the words which we have italicized. We think the instruction is a correct interpretation of the statute, and that the court erred in granting a new trial. Indeed, we do not think it is susceptible of any other reasonable interpretation. To construe it in any other way would require us to read into it the word "minor" before both the words "heirs" and "issue." There is nothing in the language to indicate in the remotest way that the law-making branch of the government intended such interpolation. Indeed, such construction would be an entire emasculation of the statute. It would lead to the absurd result that, under certain contingencies, an adult dependent sister would have a cause of action, while an adult dependent daughter would not have a cause of action. It cannot be doubted, we think, that, even under the statute prior to the 1909 amendment, the instruction would be correct. As amended, however, it is entirely free from doubt, unless we assume that the legislature intended a limitation which it did not express in words. The fact that it made provision for minor dependent brothers shows clearly that the preceding words were advisedly used. One of two views must obtain. It must be held either that the word "heirs" in the first part of the statute embraces and defines the several classes, "widow," "issue," "parents," "sister," and "minor brothers," or that the words "heirs" and "widow or issue" are intended to be synonymous terms. In either case the instruction is correct.

The trial court granted the new trial because he was of the opinion that the construction put upon the old statute by this court enunciated a principle not in harmony with the instruction. The respondent takes a like view. The cases relied upon as announcing a view not in harmony with the instruction are *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868; *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Manning v. Tacoma R. & Power Co.*, 34 Wash. 406, 75 Pac. 994. In the *Dahl* case, the action was prosecuted by the widow and minor children for the recovery of damages for wrongfully causing the death of the husband and father. The only question before the court was the capacity of the plaintiffs to maintain the action. The court, however, said:

"The sole object of such statutes is to give a right of action for damages in favor of, or for the benefit, of those who may be deprived of support and maintenance by death caused by the wrongful 'act or omission of another'."

In the *Noble* case, it was held that there was no right of action in the father and mother for the wrongful death of an adult bachelor son. In that case, also, the court said that the right of action only existed in favor of those heirs to whom the deceased while living owed the legal duty of support. In the *Manning* case, the mother, the father being dead, sought to recover damages arising from the death of her adult bachelor son, alleging that his death resulted from the wrongful act of the defendant. It was held, upon the authority of the *Noble* case, that she had no right of action. The court, however, took occasion to intimate that it did not think the *Noble* case correctly interpreted the statute, but that it would adhere to it on the ground of *stare decisis*. It is apparent that the quotation from the *Dahl* case is only *dictum*, and that the statement of the same nature in the *Noble* case was not called for by the facts before the court. It is also apparent that the court was not called upon to meet the precise question before us in any of these cases. If it may be said that they involved a similar principle, a suffi-

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cient answer is, (1) that we are not disposed to extend the rule of these cases beyond their letter, and (2) that we are here construing the law as amended.

The instruction is supported by the following cases from other jurisdictions where the cause of action was predicated upon the allegation that death was caused by the negligence of the defendant: *Redfield v. Oakland Consol. St. R. Co.*, 110 Cal. 277, 42 Pac. 822, 1063; *Valente v. Sierra R. Co.*, 158 Cal. 412, 111 Pac. 95; *Tuteur v. Chicago & N. W. R. Co.*, 77 Wis. 505, 46 N. W. 897; *Tilley v. Hudson River R. Co.*, 29 N. Y. 252; *Galveston etc. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Beaumont Traction Co. v. Dilworth* (Tex. Civ. App.), 94 S. W. 352; *Paris & G. N. R. Co. v. Robinson* (Tex. Civ. App.), 127 S. W. 294; *Missouri, K. & T. R. Co. v. Butts* (Tex. Civ. App.), 132 S. W. 88; *Demarest v. Little*, 47 N. J. L. 28; *Kansas City Southern R. Co. v. Frost*, 93 Ark. 183, 124 S. W. 748; *Petrie v. Columbia & G. R. Co.*, 29 S. C. 303, 7 S. E. 515; *Baltimore & O. R. Co. v. State*, 63 Md. 135; *Lazelle v. Town of Newfane*, 70 Vt. 440, 41 Atl. 511; *Duzan v. Myers*, 30 Ind. App. 227, 65 N. E. 1046, 96 Am. St. 341; *Butte Elec. R. Co. v. Jones*, 164 Fed. 308.

The *Redfield* case was prosecuted by the husband and minor children for damages arising from the death of the wife and mother. The California statute, Code of Civil Procedure, § 377, upon which the cause of action was rested, gave a right of action in such cases to the "heirs or personal representatives" of the deceased. In that case the following instruction was approved:

"The pecuniary interest of children in the lives of their parents does not necessarily end with their arrival at the age of majority; but you may allow for the probable loss of any benefit, if any, of a pecuniary value which the child would probably receive from its mother after its arrival at majority."

The court said, in commenting upon the instruction: "Besides, the statute does not limit the right to prosecute the

action, or to recover damages, to minor children or minor heirs." In the *Valente* case, the California court again ruled that the statute does not limit the right of recovery to minor children, and approved an instruction similar to the one given in the *Redfield* case. In the *Tuteur* case, a recovery was had for the pecuniary loss sustained by adult children for the death of their mother, their father being dead. The statute upon which that action rested gave a right of action to the personal representatives of the deceased person, and directed that the amount recovered should belong and be paid over to the "lineal descendants" or the "lineal ancestors" where neither a husband nor a widow survived the deceased. Sanborn & Berryman's Wisconsin Statutes, 1898, § 4256.

In the *Tilley* case an instruction was approved which directed the jury that, for the wrongful death of the parent, they were at liberty to allow damages to the children through the whole period of their probable lives. The court said:

"Nor do I perceive any sufficient legal reason for limiting the damages to the minority of the children if the jury are legally persuaded they would continue after that age."

The decision was based on a statute permitting a recovery for the benefit of the "widow and next of kin." Laws of New York, 1849, chap. 256. In the *Kutac* case, the right of recovery was not limited to the period of the minority of the children. In speaking of the rights of the adult child of the deceased, the court said: "He was a surviving child of the deceased and the statute makes no distinction upon this ground." The statute referred to authorizes a recovery for the benefit of the "husband, wife, children and parents." Revised Statutes Texas, 1895, art. 3021. In the *Demarest* case, the beneficiaries of the recovery were the adult children of the deceased. The statute in that state permits a recovery to the extent of the pecuniary injury resulting to the "widow and next of kin." In the *Frost* case, the trial court refused to confine the recovery to the damages suffered by the chil-

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dren, in consequence of the death of the father, to the period of their minority. The court said that the right to recover was limited only by the statute to the damages suffered, "and not to any period of life." The statute gave a right of recovery to the "widow and next of kin." Arkansas Digest, Kirby, 1904, § 6290. In the *Petrie* case, all of the children of the deceased were adults. The contention there made, that no damages could be recovered for their benefit unless they had some legal claim on the deceased, was held untenable. The statute permitted a recovery for the benefit of the "wife, husband, parent, and children" of the deceased. In the *Jones* case, the ruling of the trial court, extending the right of recovery on behalf of the son beyond the period of minority, was approved. The cause of action arose in the state of Montana. The court said that the *Redfield* case (California) was based upon a statute "precisely similar" to the Montana case, and that the *Tilley* case (New York) was based upon a statute "similar in effect." The necessary deduction is that the court construed the words in the California statute "heirs or personal representatives," and the words in the New York statute "widow and next of kin," as practically synonymous.

The respondent has cited the following authorities: *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614; *Delahunt v. United Tel. & Tel. Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. 958; *Baltimore & P. R. Co. v. Golway*, 6 App. D. C. 143; *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169; *Coleman v. Hyer*, 113 Ga. 420, 38 S. E. 962; *Dueber v. Northern Pac. R. Co.*, 100 Fed. 424.

In the first case cited, the trial court instructed the jury that the damages should be estimated to the time the children attained their majority. The defendant appealed. While the court said the instruction was correct, the question was not before it for decision. In the *Goss* case, it was held

that the children are only entitled "by law to support of the father during minority." The language of the statute is not set out in the opinion. In the *Delahunt* case, there was a judgment for the plaintiff, and the defendant appealed. The statute is not set forth. The trial court limited the recovery to loss sustained by the children for support and education during their minority. In the *Golway* case, the court held that "prospective gifts" were not recoverable as an element of damages in behalf of adult sons. In the *Hoadley* case, the trial court instructed the jury that, in estimating the pecuniary loss sustained by minor children in the death of their father, the physical, moral, and intellectual instruction and training which they would have received from him had he lived were proper elements for their consideration. The defendant's contention that this was not a proper element of damages was rejected. The question presented in this case was not considered. The *Coleman* case, and other cases cited from the state of Georgia, hold that the word "children" in a similar statute means minor children only. The *Dueber* case is based upon the same facts as the *Noble* case. The respondent has cited a number of Maryland cases which we need not consider, in view of the fact that the later case of *Baltimore & O. R. Co. v. State*, 63 Md. 135, in principle supports the instruction in the case at bar.

The evidence in this case justifies the instruction. It seems hardly necessary to say that, if the deceased had been an immoral and improvident man, or in bad health, so that it would have been mere guesswork for the jury to find that the minor son would suffer any pecuniary loss after his majority, then such an instruction would not be proper. In other words, the facts in the particular case must determine whether the instruction should be given. We think the instruction was correct, and that the court was in error in granting a new trial.

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The judgment is reversed, with instructions to enter a judgment upon the verdict.

DUNBAR, C. J., PARKER, CROW, and CHADWICK, JJ., concur.

[No. 10041. Department One. March 20, 1912.]

L. S. FRANCK, *Receiver etc., Respondent*, v. PITTOCK & LEADBETTER LUMBER COMPANY, *Appellant*.¹

LOGS AND LOGGING—IMPROVEMENT OF STREAMS—BOOM COMPANIES—TOLLS. Under Rem. & Bal. Code, §7123, providing that a boom company which had improved a navigable stream upon which it was not previously practicable to float logs, thereby aiding in the floating of logs, shall be entitled to driving charges on all logs placed in the stream without request to drive the same, it is entitled to driving charges without any actual work in handling the logs; the tolls being simply compensation for benefits conferred by improving the stream, and the right to impose the same being a right of government.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered February 21, 1911, upon findings in favor of the plaintiff, in an action to foreclose liens upon logs. Affirmed.

Miller, Crass & Wilkinson, for appellant.

Platt & Platt and Hugh Montgomery, for respondent.

Gose, J.—This is a consolidated action, prosecuted to foreclose seven liens claimed upon certain logs for sluicing, sacking, driving, sorting, holding, and delivering them. The plaintiff is the receiver of the Washougal River Improvement & Log Driving Company, a corporation organized under Laws 1905, page 128, for the purpose of clearing out and improving the Washougal river, and for sluicing, sacking, driving, sorting, holding, and delivering logs and other

¹Reported in 122 Pac. 7.

timber products. There was a decree for the plaintiff upon all the liens. The defendant has appealed.

The appellant concedes that the logs upon which three of the liens are asserted were actually "sacked," but insists that the evidence does not show that "any work was performed," either in "sacking or driving" the logs upon which the other four liens were allowed. A witness defined "sacking" as the actual handling of a log by putting it into the river from a sand bar or other obstruction or place of lodgment, and defines "splashing" as the driving of logs by opening the dam. The right to the liens is based upon the statute, Rem. & Bal. Code, § 7123. The applicable part of the statute is as follows:

"Provided, that when a navigable stream upon which it was not previously practicable to float logs or other timber products is improved by clearing out rocks, straightening the channel, or the construction of wing dams and sheers by the corporation having a charter thereon, and thereby aiding and assisting the floating of logs and other timber products, a corporation shall be entitled to driving charges on all logs or other timber products placed in said stream without request to drive the same, . . ."

The court found:

"That before said corporation entered upon said river and cleared the same, as aforesaid, said river could not be prudently relied upon for the purpose of floating logs or other timber products, without the assistance of artificial means, or improvements, and that said corporation has improved said river by clearing out rocks, straightening the channel, and constructing wing dams and sheers, thereby aiding and assisting the floating of logs and other timber products, and that before said improvements were so made said stream was not navigable for the purpose of driving logs or other timber products, and before such improvements were so made on said river by such corporation logs would be caught in sloughs and piled up on bars, which are very prevalent in said river, and said improvements have made it possible to, and have, sheered logs out of sloughs and off of said bars."

While the statute may not be happily worded, it clearly means that, where a boom and driving company has made improvements upon a stream, in a measure navigable but not practicably navigable for the floatage of logs and other timber products, which aid and assist the floating of the logs, it shall be entitled to driving charges on all logs placed in the stream, "without request to drive the same." In other words, neither an actual "driving" nor an actual "sacking" is required to entitle the driving company to the toll.

The finding of the court is amply sustained by the evidence. The evidence shows that the stream in its natural state, even at its flood, could not be prudently relied upon for the floatage of logs, and that the improvements made by the boom and driving company facilitated the floating of all the logs upon which the right to liens is asserted. It further shows that all the logs were commingled with logs belonging to other parties than the appellant. The Washougal River etc. Company is a public service corporation. The purpose of the law is to permit such companies to improve the rivers and streams of the state, so as to make them practicably navigable for floating logs and other timber products, and to allow them to charge a toll for such service when the improvement has aided in the accomplishment of the end in view. It is not necessary that the company shall do any actual work in the handling of the logs. It suffices if the improvement it has made aids in floating them. Such streams are a public highway common to all, and the legislature foresaw that, without such improvements, there would be a commingling and congestion of logs so as to in fact destroy the common right. The state itself could have made the improvement, either by levying a general tax or by the exaction of tolls. It chose, however, to leave the field open to public service corporations. The right to impose tolls as a consideration for carrying out an enterprise intended to benefit the public is a right of government. *Bennett's Branch Imp. Co.'s Appeal*, 65 Pa. St. 242. As was said in *Sands v. Manistee River Imp.*

Co., 123 U. S. 288: "The tolls exacted from the defendant are simply compensation for benefits conferred by which the floating of his logs down the stream was facilitated."

The decree is affirmed.

CHADWICK, PARKER, and CROW, JJ., concur.

[No. 10035. *En Banc*. March 20, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Golden Valley Irrigation Company, Plaintiff*, v. THE SUPERIOR COURT FOR YAKIMA COUNTY, *Respondent*.¹

STATUTES—TITLE AND SUBJECTS—AMENDATORY ACTS. The title "an act to amend an act approved November 13, 1873, entitled an act to provide for the formation of corporations" is sufficient and broad enough to include a provision conferring the right of eminent domain on corporations organized for certain purposes.

EMINENT DOMAIN—PUBLIC USE—IRRIGATION. The use of waters for irrigation is a public use, under Const., art. 21, § 1, providing that "the use of the waters of this state for irrigation . . . shall be deemed a public use."

EMINENT DOMAIN—IRRIGATION—"CORPORATE PURPOSES"—RESERVOIRS. Under Rem. & Bal. Code, § 9510, providing that corporations organized for the purpose of erecting and maintaining flumes or aqueducts to convey water for . . . irrigation . . . shall have the same right to appropriate lands for necessary corporate purposes as other corporations and to take any water not otherwise legally appropriated, an irrigation company may condemn land for a reservoir site, that being a "necessary corporate purpose" within the act, where it is necessary to store water in order to accomplish irrigation (PARKER, CHADWICK, and FULLERTON, JJ., dissenting).

Certiorari to review a judgment of the superior court for Yakima county, Preble, J., entered November 9, 1911, dismissing a condemnation proceeding, upon sustaining a demurrer to the petition. Reversed.

¹Reported in 122 Pac. 19.

Parker & Richards (Milo A. Root, of counsel), for relator.

Holden & Shumate, H. A. La Berge, and H. J. Snively, for respondent.

MOUNT, J.—The question presented in this case is, whether a corporation organized for the purpose of irrigation has the right to take land by condemnation for a storage reservoir site. The lower court held that the relator had no such right under the statute, and for that reason sustained a demurrer to the relator's petition, and dismissed the proceeding to condemn land for that purpose. The relator thereupon sued out this writ of review.

The relator rests its right to condemn land for a reservoir site upon the law found in the territorial session Laws of 1879, page 184, as follows:

"An act to amend an act approved November 13, 1873, entitled an act to provide for the formation of corporations.

"Section 1. Be it enacted by the legislative assembly of the territory of Washington: That all corporations, authorized to do business in the territory, and who have been, or may hereafter be, organized, for the purpose of erecting and maintaining flumes or aqueducts to convey water for consumption or for mining, irrigation, milling or other industrial purposes, shall have the same right to appropriate lands for necessary corporate purposes, and under the same regulations and instructions as are provided for other corporations in the act to which this is amendatory, and such corporations organized for such purposes, in order to carry out the object of their incorporation, are authorized to take and use any water not otherwise legally appropriated or legally claimed.

"Sec. 2. This act shall take effect and be in force from and after its passage.

"Approved November 14, 1879."

This law was reenacted in the Code of 1881, § 2472, omitting the words, "in the act to which this is amendatory," and has been carried forward into the subsequent codes. Rem. & Bal. Code, § 9510. This law has never been specifically repealed or amended, and we think has not necessarily been

repealed by implication. The validity of this statute is questioned by respondent, upon the ground that the title of the act is insufficient. That question was settled in *Prescott Irr. Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635. When the state constitution was later adopted, a section was inserted providing: "The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use." Art. 21, § 1. There can be no doubt, therefore, that the use of water for irrigation is a public use.

It is argued by the respondent that, because the statute quoted above provides that corporations organized for the purpose of erecting and maintaining flumes or aqueducts to convey water shall have the right to appropriate lands for necessary corporate purposes, the words "necessary corporate purposes" refer to the purposes named in the act, viz., "erecting and maintaining flumes or aqueducts to convey water;" that the act should be strictly construed, and inasmuch as it does not mention reservoirs, the mere fact that the corporation was organized for the purpose of constructing and maintaining reservoirs, flumes, aqueducts and ditches for irrigation, does not give the corporation the right to condemn land for other purposes than flumes and aqueducts to convey water.

If this construction must be given to the act, it follows that the relator may acquire by condemnation such lands only as are necessary for a flume or an aqueduct to convey water, and that no land can be so acquired for the purposes of a reservoir site or for the storage or conservation of water. The object of this statute was to provide for irrigation and the other purposes named. The object of a corporation formed for irrigation is not merely to erect and maintain flumes or aqueducts. These are mere necessary incidents to the main object or purpose. The object is to irrigate lands and to use water for that purpose. Flumes or aqueducts are of no use without water. Irrigation cannot be consummated without water. Water cannot be success-

fully carried from one place to another without aqueducts. The application of water to the soil constitutes irrigation. Without water, irrigation fails. The acquisition of water is therefore necessary. If water can be obtained from streams or natural lakes at proper times and in sufficient quantities, a storage reservoir would not be necessary; but when it is necessary to store water in order to accomplish irrigation or to use the flumes or aqueducts, a reservoir is a necessary corporate purpose. When we consider the purposes of the act, it seems apparent that, when the legislature said corporations organized for the purpose of erecting flumes or aqueducts to convey water *for irrigation*, it was meant thereby to include corporations organized for irrigation; and when the legislature said such corporations shall have the same right to appropriate lands for necessary corporate purposes as other corporations, and, in order to carry out the objects of their incorporation, are authorized to take and use any water not otherwise legally appropriated, it was meant that such corporations might take and hold water for the purposes named. The only way this can be done in this case is by storage. A storage reservoir is therefore a necessary corporate purpose. To construe the act otherwise, would be to say that a corporation organized to construct flumes or aqueducts for irrigation is limited to the right to condemn land for a flume or aqueduct only, with no power to provide water for such flumes or aqueducts unless it may be done from continuous flowing streams or lakes. This construction places a restricted meaning upon the words "for necessary corporate purposes." If these words were meant to restrict the right to appropriate water to the purposes of a flume or aqueduct, we think the restrictive phrase "for such purposes" would have been used instead of the general phrase "for necessary corporate purposes." These words are general. They were intended to enlarge the right to appropriate lands rather than to restrict such right.

Much is said in the briefs and in the oral argument about

the use of the word "reservoir," in other statutes and constitutions adopted about the time our constitution was adopted. While it may be true that a flume or aqueduct is not necessarily a reservoir, as that word is commonly used and understood, we deem it unnecessary to enter into a discussion of the meaning of these terms, because we are of the opinion that the statute meant to give to irrigation companies the right to take lands for necessary corporate purposes without limitation other than necessity; and when it appears that a reservoir is necessary for the convenient and appropriate use of water for irrigation, such corporation has the right to take land for that purpose by condemnation. In short, the general phrase "for necessary corporate purposes" includes all the essential means, and it was therefore not necessary to specify all of the particular means for irrigation.

The judgment is therefore reversed, with directions to the lower court to proceed in harmony with the views herein expressed.

DUNBAR, C. J., CROW, ELLIS, MORRIS, and GOSE, JJ., concur.

PARKER, J. (dissenting)—I am not able to concur in the foregoing opinion of the majority, and am moved to state my dissenting views as follows: Viewed superficially, this grant of eminent domain power "to appropriate land for necessary corporate purposes," may seem very broad and comprehensive. I think it is manifest, however, that the scope of the power thus granted must be limited by the general powers of the corporations to which it is granted, as those general powers are defined by this law. It is inconceivable that a corporation can have the right to acquire property by condemnation for purposes not within its general powers, however broad and comprehensive the language of the grant of the eminent domain power may be. The language of the first part of the law leaves no uncertainty upon that subject, for it tells us that "corporations . . . or-

ganized for the purpose of erecting and maintaining flumes or aqueducts to convey water for irrigation . . .” are the corporations to which this right of eminent domain is granted. Looking to the language of this law alone, it seems to me there is no escape from the conclusion of the learned trial court that the purposes therein specified for which the corporations mentioned are organized, to wit, for maintaining flumes and aqueducts, fix the limit of the right of eminent domain thereby granted to such corporations, and that the acquiring of reservoir sites by condemnation is not included therein. Clearly the words “flumes or aqueducts” do not include “reservoirs” of the nature for which land is here sought to be acquired, especially in view of the language of the law which mentions flumes or aqueducts to “convey water.” I think that this language gives nothing more than the right to acquire by condemnation, rights of way for “flumes or aqueducts.”

It appears by the allegations of the relator's petition for condemnation that its corporate powers, as defined by its articles of incorporation, include the power to maintain reservoirs for the purpose of impounding water. This no doubt is a proper power to be exercised by the relator; and there seems to be no legal objection to its including such power among its other general corporate powers. Under such power it, of course, can acquire by purchase reservoir sites. But the relator cannot extend its right of eminent domain beyond that granted by this law merely by including corporate powers in its articles of incorporation in excess of the corporate powers specifically mentioned in this law for the very purpose of describing the corporations to which the right of eminent domain is given. When this law gave the right of eminent domain “*to appropriate land for necessary corporate purposes*” to corporations organized for “*maintaining flumes or aqueducts to convey water,*” it gave the right to so acquire land for the maintenance of flumes or aqueducts and nothing more, just as if it had named these two purposes in

the grant, instead of using the words "for necessary corporate purposes." Because those are the only corporate purposes recognized in the corporations mentioned, so far as their right of eminent domain is measured by this law. Whatever general powers in addition to these the relator may have by virtue of its articles of incorporation are of no consequence, so far as its right of eminent domain is concerned under this law.

If we turn to the act of 1873 which this law purports to amend, Laws of 1873, pp. 411, 417, we find nothing there suggesting an extension of this right of eminent domain beyond appropriating land for "flumes or aqueducts." It seems that the language of this law giving the right of eminent domain "under the same regulations and instructions as are provided for other corporations in the act to which this is amendatory," only relates to the condemnation procedure provided by the law of 1873. But even if we consider the right of eminent domain granted by the law of 1873 to other corporations, we find that such right is not there granted in general language for corporate purposes, but the several purposes for which private property may be so acquired are specifically enumerated therein, and neither reservoirs nor reservoir sites are among them.

Our attention is directed to some decisions of this court by counsel for relator which it is insisted support their contention that this grant of right of eminent domain is sufficiently broad to include reservoir sites. Our attention is first directed to *State ex rel. Attorney General v. Superior Court*, 36 Wash. 381, 78 Pac. 1011, in which case it was sought to condemn state school lands for the purpose of "procuring water for household and domestic purposes and also for a reservoir site." The right to condemn was apparently rested upon the law of 1879 above quoted, and was denied by the court in that case upon the sole ground that school land was not subject to condemnation under that law, the court observing that "condemnation statutes, overriding

as they do, the high right of private property, and being in derogation of common right must be strictly construed," citing numerous authorities in support of this rule. In the course of the decision, however, referring to this law, the court said: "That section appears to confer power to appropriate lands for such corporate purposes as are sought to be accomplished here." I hardly think this is an expression of positive opinion as to the right to condemn land for a reservoir site under this law; but if it be regarded as such, it in any event was only *dictum* and was wholly unnecessary to a decision of the case, and would seem to be somewhat out of harmony with the rule of strict construction above quoted upon which the court there rested its decision.

The other decisions relied upon and called to our attention by counsel for relator, are *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198, and *State ex rel. Harris v. Olympia Light & Power Co.*, 46 Wash. 511, 90 Pac. 656. While it is true that the disposition of these cases resulted in the acquiring of land by eminent domain proceedings for storing water, the right of the power companies to so acquire the land for that purpose was not challenged. Their right to condemn was challenged upon other grounds. So those cases do not aid us in the problem here for solution. In view of the statutory provisions under which those power companies were seeking to exercise the right of eminent domain, it could well be argued that their power to acquire reservoir sites by condemnation was granted by the statutes under which they were proceeding. We are not called upon, however, to express any opinion upon that question. It is enough to say that they were not proceeding under this law nor was their right of eminent domain challenged upon the ground here presented.

It is insisted that the construction given this law by the learned trial court is not in keeping with the "broad views" expressed by this court in *State ex rel. Galbraith v. Superior*

Court, 59 Wash. 621, 110 Pac. 429, 140 Am. St. 893, and of the United States supreme court in *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, and *Clark v. Nash*, 198 U. S. 361. Those decisions dealt mainly with the power of the state to exercise and grant the right of eminent domain in promoting irrigation. It is only in measuring the sovereign power of the state that it can be said any such broad or liberal views were expressed in those decisions. When it comes to a determination of the extent of the grant of eminent domain power by the state to persons and corporations, I see nothing in those decisions which would call for any departure from the rule of strict construction indicated by the language above quoted from *State ex rel. Attorney General v. Superior Court*. It may be that a wise legislative policy would call for the granting of the right of eminent domain to public service irrigation corporations, enabling them to acquire reservoir sites such as the relator is here seeking to do, but that view, however sound as a matter of policy, would furnish no reason for our reading into the law something which we do not find there. I think the judgment should be affirmed.

CHADWICK, J. (dissenting)—I think Judge Parker has clearly shown that the act relied on to sustain the majority opinion will not bear the construction put upon it. I will not discuss that feature of the case, but refer to two propositions, one of law and the other of fact or policy as it may be, either of which in my judgment should restrain the court from pronouncing its present judgment to be the law of the land.

It is a settled principle that, if an act granting the power of eminent domain be doubtful, its terms will not be extended or enlarged by construction.

“The right to take private property in any form, without the consent of the owner, is a high prerogative of sovereignty, which no individual or corporation can exercise without an express grant. The power may be delegated, but the delegation must plainly appear. It is accordingly held that

statutes providing for such a taking under the exercise of the power of eminent domain must be strictly construed. It is a taking in derogation of private rights. It is in hostility to the ordinary control of the citizen over his estate, and statutes authorizing condemnation are not to be extended by inference or implication." 2 Lewis' Sutherland Statutory Construction (2d ed.), § 559.

The law does not mean doubt in the mind of one judge or a majority of the court, for we know that they have no doubt; otherwise they would not have pronounced the decision. But, as employed in the canon just referred to, doubt means, to use the language we have so often employed in negligence cases, that the minds of reasonable men differ upon the proposition advanced. Here we have a statute passed forty years ago, and at a time when the problem of irrigation had not developed to such an extent as to demand storage of flood waters. Men led water out of flowing streams and onto their own lands. The irrigation company as we now know it and the storage of flood waters was, as we may assume, never considered by the legislature, for it clearly legislated for existing conditions and not for that which was not foreseen. The old act has stood unimpaired and unamended during all these years, and we may take it as a positive postulate that the legislature never intended to put the sovereign power of the state to control an agency as destructive as dynamite into irresponsible hands. At the same session, and on the same day, an act was passed granting to manufacturing and mining companies the right to make reservoirs. It was left out of the irrigation act, and as I believe purposely, for the mill dam of a generation ago is as nothing compared with the reservoir for impounding the flood waters of the winter season as they are at present constructed. The one rarely raised the waters above the banks of the stream. The other spreads it over vast areas. The capacity of the one can be measured in thousands of gallons. The other is measured in millions. As a matter of good sound public policy, this court should not grant by construction a power

which should never be granted, even by legislatures, without safeguarding in every possible way the rights of the public. The danger of our decision lies in this, that although we grant the power, we can put no restraint upon it. The law is left by this decision in this way: The irrigation company can condemn without let or hindrance and build without restraint or supervision, to the possible peril of life and property below the dam. The building of such reservoirs, because of the great attendant danger, should never be allowed or entertained until the legislature has fixed the method and manner of construction or reserved the right of supervision. The court being divided, we should wait the few months which will intervene, when the matter can be settled by the legislature in such way as it sees fit.

In an article of singular worth, published in the *Technical World Magazine* for January, 1912, it is shown that, since 1890, 35 solid masonry dams, 41 earth dams, four rock-filled dams, and one steel dam, have gone out from one cause or another; and while the damage is not aggregated, it is said that the damage at the Johnstown flood was \$10,000,000, and at the Austin flood, \$6,000,000 in money. The floods mentioned cost the lives of more than 2,000 people. The writer says:

"The twenty years between Johnstown and Austin are dotted thick with similar warnings, men, women and children swept away and drowned, property wiped out of existence. At least eighty-one dams of considerable size burst, unleashing ruin, during those twenty years. . . . In only four or five states—Rhode Island, Massachusetts, Connecticut and Colorado—has there been even a pretense of protecting people and property against the danger of dams, improperly built or maintained. Almost everywhere greedy or ignorant private interests have been permitted—free from the inspection of state engineers—to pen back great floods behind dams which were certain, sooner or later, to break and let ruin loose upon the countryside. And the excuse has always been that nothing must be done to interfere with the growth of business. But whatever the menace of the dam

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in the past, the time has now come when to delay longer the passage and enforcement of strict and scientific inspection laws will be worse than criminal carelessness. . . . But few structures built by man are so certain as are dams to be subject to abnormal tests by the almost resistless forces of nature. Yearly it is probable that great floods will sweep down the water-sheds and perhaps double the pressure behind the dams which block their way. If the dam holds, the flood water may force its way round the ends of the masonry and sweep away the earth and rubble wings. That is what happened in Wisconsin at the two dams on the Black river, with the result that the frightened people of Black River Falls looked down a few hours later on a swirling river covering the land where had stood their banks and business houses. Imminent death and destruction for thousands of people are penned behind the walls of a thousand dams in the United States alone. Even when—as at Austin—warning is given that the wall is too weak, corporation managers—their own lives not in danger—are too often willing to take a chance with the lives and property of other people.”

For these reasons, then—one, that our minds differ as to the construction of the act, and the other that sound public policy demands that the questions here discussed be settled by the legislative branch of the government—I am impelled to dissent from the views of the majority.

FULLERTON, J. (dissenting)—For the reasons stated by Judges Parker and Chadwick, I dissent from the conclusions of the majority.

[No. 10039. Department One. March 21, 1912.]

JAMES LAWN *et al.*, Respondents, v. M. PRAGER, Appellant.¹

EVIDENCE—DOCUMENTARY EVIDENCE—ACCOUNT BOOKS—ENTRIES. A book of account kept by general contractors is admissible in evidence, where it appears that the items were entered from information and data acquired from blank slips filled out by their employees and turned in each week showing the time and kind of work done by each, and checked by the foreman, the foreman testified from personal knowledge to the correctness of the data, and the person making the entry in the book testified to the correctness of the original data and the record thereof in the book.

CHADWICK, J., dissents.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered July 11, 1911, on findings in favor of the plaintiffs, in an action to foreclose mechanics' liens. Affirmed.

Leopold M. Stern (*J. W. Russell*, of counsel), for appellant.

Frank S. Griffith and *E. H. Kohlhasse*, for respondents.

PARKER, J.—This is an action to foreclose a lien claimed by the plaintiffs upon the interest of the defendant in a certain store building, and the land on which it is situated, in Seattle, for extra work and for material furnished in remodeling the building under a contract therefor. A decree of foreclosure was rendered in favor of the plaintiffs, from which the defendant has appealed.

It is first contended by counsel for appellant that the trial court erred in admitting in evidence a certain book of account containing a record purporting to show the amount of extra work performed upon the building by respondents' employees in excess of that required by their original contract for the remodeling of the building. This book was kept for

¹Reported in 121 Pac. 466.

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Opinion Per PARKER, J.

that express purpose. All of the items were entered therein by respondent Lawn in his own handwriting, from information and data acquired by him as follows: At the beginning of each week each employee was furnished with a blank slip upon which he kept a record of his time and also a record of the time he worked at each particular kind of work. Respondents' foreman also kept a record of the time of each employee in the same manner. At the end of each week, each employee turned his slip over to the foreman, after signing it, and the foreman then compared the data thereon with his own record for the purpose of verification. The slips were then turned over by the foreman to respondent Lawn, who paid the employees their wages based upon this data. The wages of the employee did not depend upon the record of the kind of work he had performed during the week, but simply upon his total time. The record of the kind of work was kept in order to enable respondents to segregate the amount of time consumed in the performance of each class of work. When this data was furnished to respondent Lawn at the end of each week, he entered in this book the amount of work, in hours, and the nature of the work, performed by each employee during the week upon the building, not included in the original contract of remodeling it. That is, the extra work performed over and above the contract. The purpose of this record was to enable respondents to make a proper charge against appellant for the extra work, and according to Lawn's testimony this data was sufficient for that purpose. These entries cover a period of several weeks, and were made in this manner in accordance with a general custom and course of business pursued by respondents in keeping their accounts of extra work performed by their employees upon this and other contracts which they had, they being general building contractors. The foreman testified to the correctness of the slips turned in by him to respondent Lawn, though at the time of the trial the slips kept by himself had been lost. The data contained in these slips was all within his personal

knowledge; that is, they were merely memoranda made by himself of facts within his own knowledge. So his testimony went to the extent of showing that he furnished to respondent Lawn correct data. Respondent Lawn testified to the correctness of the recording of that data by him in this book. Hence, we have no hearsay evidence here. Under the circumstances shown, we think this book was admissible in evidence. While it required the testimony of both of these witnesses to verify the correctness of the original data and the correctness of the record thereof in this book, so far as the admissibility of this book is concerned, it is in principle the same as if we had but one witness with knowledge of the original transactions and also knowledge that they were correctly recorded in this book. The correctness of this view finds support in the statement of Professor Wigmore, in his work on Evidence, vol. 2, § 1530, where he remarks as follows:

“There can be no doubt that the general principle of testimonial evidence (*ante*, § 657) should apply here as elsewhere, namely, that the person whose statement is received as testimony should speak from personal observation or knowledge. This principle has often been invoked in excluding entries made by a person who had no personal knowledge of the supposed facts recorded.

“But does this principle necessarily exclude all entries made by persons not having personal knowledge of the facts entered? May not this lack of personal knowledge on the part of the entrant be supplemented by the personal knowledge of some other person whose knowledge is in fact represented in the entry? In other words, if the element of personal knowledge can somehow be adequately supplied by a *third person*, is it material that the *entrant himself did not have this personal knowledge*? In order to work out this problem, it is necessary to keep in mind the results already established in connection with the doctrine about memoranda of past recollection (*ante*, § 751). It was there noticed that a memorandum whose correctness was established by composite testimony could be used; for example, if S has made a written memorandum of a transaction done by him, and has given the writing to B, who has copied it and destroyed the original,

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then if S swears the original to have been accurately made, and if B swears the copy to be correct, the copy produced is thus by their joint testimony rendered an accurate record of the transaction, although B alone has no personal knowledge of the transaction and although S alone does not know the copy to be correct."

See, also, 17 Cyc. 392, 394.

Our attention is called to *Union Elec. Co. v. Seattle Theater Co.*, 18 Wash. 213, 51 Pac. 367, in support of appellant's contentions. A reading of that case will show, however, that the book entries sought to be introduced in evidence were made from data, the correctness of which was not vouched for by any witness nor by any correct legal method whatever. They were not made by one who had knowledge of the original transaction, nor made from data which had been collected or noted by any one in the due course of business.

Other contentions made in behalf of appellant involve nothing but questions of fact. The evidence is very voluminous, and the items involved are also numerous. To analyze these contentions here would only be to recite and argue upon a great mass of details, to no useful purpose. We have read all of the evidence and are convinced therefrom that the trial court was fully warranted in rendering its decree of foreclosure. The judgment is affirmed.

DUNBAR, C. J., GOSE, and CROW, JJ., concur.

CHADWICK, J. (dissenting).—Without reviewing the testimony, for it will serve no purpose, I desire to say that I am not convinced that the items charged as extras are in fact extras. I believe the disputed items were understood by the parties to be included in the original contract. I therefore dissent.

[No. 9537. *En Banc*. March 21, 1912.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Respondent*, v.
 GEORGE B. HELGESEN *et al.*, *Appellants*.¹

MORTGAGES—EXECUTION—SIGNING — ACKNOWLEDGMENT — ADOPTION OF SIGNATURE—INTENTION. Under Rem. & Bal. Code, § 8746, requiring deeds to be signed and making the acknowledgment a necessary part of its execution, the acknowledgment of a mortgage which the mortgagor inadvertently omitted to sign, and her intention to sign, is not equivalent to, or a substitute for, an actual signing, which is required by the statute in order to pass title, nor can it be said that she intended to adopt as her signature her name written in the mortgage as the grantor (overruling, on rehearing, *Id.*, 64 Wash. 54. DUNBAR C. J., PARKER, and MOUNT, JJ., dissenting).

MORTGAGES—RENEWAL—RELEASE—MISTAKE IN EXECUTION—EQUITABLE SUBSTITUTION. Where new notes and a mortgage were given, not in satisfaction, but in renewal of a former mortgage on the same security, and the cancellation of the old and substitution of the new mortgage were contemporaneous acts, equity, looking to the substance rather than the form, will, when the new mortgage is found ineffectual for want of proper execution, disregard the release as failing for want of consideration, and substitute the old mortgage as a continuing lien securing the continuing debt, as between the parties, by a doctrine akin to equitable subrogation.

EXECUTION—SALE—PURCHASERS—BONA FIDE PURCHASERS. An execution creditor purchasing at his own sale is not a *bona fide* purchaser and takes only the actual interest of the judgment debtor; so that, upon the equitable substitution, as between the parties, of an old mortgage, consideration for the release of which had failed through defects in the execution of a renewal mortgage by the judgment debtor, the lien of the old mortgage is restored taking its former priority over the lien of the judgment.

MORTGAGES—FORECLOSURE — RENEWAL — EQUITABLE SUBSTITUTION. Upon the foreclosure of a void mortgage, given in renewal of a former mortgage, upon the same security, a decree foreclosing the void mortgage may be sustained, as between the parties, by the equitable substitution of the old mortgage as a continuing lien securing the continuing debt, without the necessity of a new trial (FULLERTON and CHADWICK, JJ., dissenting).

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered January 20, 1911, upon findings

¹Reported in 122 Pac. 26.

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in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions upon promissory notes and for the foreclosure of mortgages. Affirmed.

George W. Bright, for appellant Helgesen.

Hamlin & Meier, for appellants Erickson.

Farrell, Kane & Stratton, for respondent.

ON REHEARING.

ELLIS, J.—This is an action by the American Savings Bank & Trust Company for the foreclosure of a mortgage upon certain property in Mason county. George B. Helgesen was made a defendant as owner of the land by virtue of purchase under an execution sale upon a judgment in his favor against the defendants Erickson and wife. The record presents a contest for priority between the mortgage and Helgesen's title. The trial court adjudged the mortgage the paramount lien. On appeal, department one of this court, by an opinion filed July 6, 1911, affirmed that judgment. *American Savings Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 116 Pac. 837. We refer to that opinion for a very complete statement of the facts, which it will not be necessary to repeat here.

On a rehearing *en banc*, a majority of the court are satisfied that a correct result was reached in the former opinion. Those of us who concur in this opinion believe, however, that the former opinion was based upon an untenable ground, and one which would tend to render the tenure of land insecure. The finding that the bank was an innocent holder for value of the original notes and mortgage given by Erickson and wife to Mrs. De Wees, we think correct as sustained by the evidence, as was, also, the finding that the new notes and mortgage given in renewal of these were without marks of usury and innocently taken by the bank. But we are constrained to hold that Mrs. Erickson never executed, either in fact nor by any safely established rule of adoption, the new

mortgage upon the land, though she unquestionably intended to sign the mortgage and actually did execute the new notes. As said in the dissenting opinion on the first hearing:

“Her failure to sign the mortgage was due entirely to an inadvertence and oversight. An intention to sign an instrument cannot be held equivalent to an actual signing of the instrument. If she intended to sign her own name to the mortgage and failed to do so by inadvertence, it would seem conclusive that she did not intend to adopt her name written by another as her signature.”

The two intentions are manifestly inconsistent. Her subsequent signing of the mortgage further emphasizes this inconsistency.

It does not follow, however, that, on the whole evidence, the judgment lien by virtue of which Helgesen claims title should be given precedence of the mortgage. The cancellation of the old mortgage and the substitution of the new were contemporaneous acts. The manifest intention of all parties interested and participating was not to discharge the lien of the mortgage but to continue it. The purpose was not to create a new encumbrance, but merely to change the form of the old. A court of equity will look straight to the substance of the transaction, rather than give heed to the mere form which it may assume. As between the parties, it would be plainly inequitable to permit the release of the old mortgage, which was intended only to give place for a valid new one, to have any operative force when the new mortgage contrary to all intention was ineffectual. The new notes and mortgage were not given in satisfaction, but in renewal of the debt and on the same security. By a doctrine closely akin to that of equitable subrogation—and it seems to us one founded in equal equity and reason—the old mortgage though released must be substituted for the new and treated as a continuing lien securing the continuing debt. This is certainly true as between the original parties. The new mortgage failing, the release was without consideration and also fails.

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"We regard the cancellation of the old mortgages and the substitution of the new, as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of, and for the purpose of, giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative." *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603.

See, also, *Dillon v. Byrne*, 5 Cal. 455; *Birrell v. Schie*, 9 Cal. 104. The foregoing language is quoted with approval by the supreme court of Indiana in *Pouder v. Ritzinger*, 102 Ind. 571, 1 N. E. 44, a case closely approaching this in principle. In that case, as here, the old mortgage was released, the mortgagee taking a new mortgage in its place to secure the same debt. The court held that equity would continue the old mortgage by substitution for the new in order to cut off an intervening claim of dower in the wife of the mortgagor. The same equitable principle that land charged with a debt can only be discharged therefrom by payment or a voluntary and intentional release, is, under varying circumstances, exemplified in the following decisions: *Burns v. Thayer*, 101 Mass. 426; *Gerwig v. Shetterly*, 64 Barb. 620; *Christie v. Hale*, 46 Ill. 117; *Jones v. Parker*, 51 Wis. 218, 8 N. W. 124; *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; *Hazleton v. Lesure*, 9 Allen 24; *McKay v. Obenchain*, 58 Miss. 670; *Young v. Shaner*, 73 Iowa 555, 35 N. W. 629, 5 Am. St. 701; *Bruse v. Nelson*, 35 Iowa 157; *Campbell v. Trotter*, 100 Ill. 281; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *McKenzie v. McKenzie*, 52 Vt. 271; *Stafford v. Ballou*, 17 Vt. 329; *Wooster v. Cavender*, 54 Ark. 153, 15 S. W. 192, 26 Am. St. 31.

It seems too plain for argument that the mortgagors, Erickson and wife, could not assert any rights founded upon a release of the prior mortgage. A little consideration makes it equally plain that the appellant Helgesen stands in no better position than the Ericksons. He claimed under a judg-

ment lien. He was an execution creditor purchasing at his own sale. Under the established rule in this state, he was not a *bona fide* purchaser. He took no greater rights than the execution debtor had. His judgment was a lien upon the real, not the apparent interest of the debtor.

"It is conceded that in this state the judgment is a lien on the real, and not the apparent, interest of the debtor; so that, if the appellant prevails in this action, he must bring himself within the provisions of the statute in relation to *bona fide* purchasers. 1 Hill's Code, § 1439. On the question of whether an execution creditor purchasing at his own sale is a *bona fide* purchaser, within the meaning of the recording act, there is an acknowledged conflict of authority. But it is not necessary to discuss the relative merits of these authorities, for this court has uniformly held that such purchaser was not a *bona fide* purchaser, although the appellant has placed a different construction upon such decisions. The decisions, however, show conclusively that the court has made no distinction in principle between purchasers of personal and real property." *Hacker v. White*, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. 945.

And again:

"The principal thought which we had in mind at the time was that under the well settled rule applicable to such sales the title derived by the purchaser is measured by the real, and not the apparent, title of the judgment debtor, and that, as under the facts disclosed by the record the judgment debtor was not in a condition to assert any rights as against the mortgage in question, or the deed made in satisfaction thereof, the purchaser at such sale took subject thereto." *Elwood v. Stewart* (on petition for rehearing), 5 Wash. 736, 32 Pac. 735, 1000.

See, also, *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501; *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748; *Bloomingtondale v. Weil*, 29 Wash. 611, 70 Pac. 94; *Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489; *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816, 75 Am. St. 841.

"This rule, which is plainly correct, as being in accordance with principle and preserving the consistency and symmetry

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of the equity jurisprudence, has been adopted and firmly established by the courts in many of the states." 2 Pomeroy, Equity Jurisprudence (3d ed.), § 721, note 2c, citing many decisions; *London & San Francisco Bank v. Dexter Horton & Co.*, 126 Fed. 593.

Whatever may be said of the reason given in the original opinion, we are satisfied, upon the considerations herein expressed, that the conclusion there reached was correct.

The judgment is affirmed.

MORRIS, GOSE, and CROW, JJ., concur.

PARKER, J. (concurring)—I concur in the views expressed in this opinion as to the new grounds upon which the judgment is affirmed; but do not recede from the position taken in the former opinion rendered by department one.

MOUNT, J., concurs with PARKER, J.

DUNBAR, C. J. (concurring)—I want to affirm this judgment for the reasons given in the first opinion.

FULLERTON, J. (dissenting)—I am unable to concur in the foregoing decision. Since the court now holds that the mortgage sued upon was never executed by Mrs. Erickson "either in fact or by any safely established rule of adoption," it should not allow the judgment foreclosing the mortgage to stand. The property mortgaged was the community property of Erickson and wife. As such, it could not be encumbered by the lien of a mortgage without both husband and wife joining in the execution of the mortgage. Since, therefore, this mortgage was not executed by both husband and wife, it is void, and the effect of allowing the judgment to stand is to allow the foreclosure of a void mortgage. This is sought to be justified on the principle that there was a valid mortgage, good as between the parties, because they executed it, and good as against the Helgesens because they are purchasers at an execution sale and can have no better title than judgment debtors, which could have been fore-

closed. But it seems to me that this reasoning does not answer the objection. In the first place, it assumes that there is no defense to the first mortgage, a question that neither of the parties have as yet had a chance to litigate; and in the second place, it is not good practice to permit the foreclosure of an invalid mortgage merely because there is a valid one existing securing the same debt which could be foreclosed. If the debt sued upon is not to be voided entirely, the case should go back with leave to the plaintiff to foreclose the original mortgage, if it so desires, and with leave to the defendants to set up such defenses thereto as they may have.

I have not discussed the merits of the controversy. I am of the opinion, however, that the evidence abundantly shows that the plaintiff bank had knowledge of the usurious character of the notes at the time it claims to have purchased them; but as this is a question important only to the litigants themselves, I refrain from setting out the reasons for my belief.

The cause should be remanded for further hearing.

CHADWICK, J., concurs with FULLERTON, J.

[No. 9878. Department One. March 22, 1912.]

E. H. NADEN, *Respondent*, v. CLARENCE J. CHRISTOPHER
et al., *Appellants*.¹

MORTGAGES—FORECLOSURE—DECREE — SALE — SECOND SALE FOR INSTALLMENTS DUE AFTER JUDGMENT. Under Rem. & Bal. Code, § 1126, providing that on foreclosure of a mortgage upon which installments are not due, the final judgment shall direct at what time and upon what default any subsequent execution shall issue, and Id., §§ 1127, 1128, providing for sales in parcels or as a whole, and that in case of sales in parcels the judgment shall remain and be enforced upon any subsequent default, after final decree an order may be entered directing a sale to satisfy installments that have since become due; and the fact that the defendant had paid the amount due on the judgment does not prevent further proceedings in the

¹Reported in 122 Pac. 2.

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case in the nature of a second judgment directing sale for subsequent installments; the judgment being conclusive as to the validity of the mortgages and all defenses except those accruing subsequent to the decree, which may be set up on application for subsequent executions.

Appeal from an order of the superior court for Whatcom county, Hardin, J., entered June 19, 1911, after decree foreclosing a mortgage, directing a sale for installments due since final judgment, upon application of the plaintiff. Affirmed.

Craven & Greene, for appellants.

Hadley, Hadley & Abbott, for respondent.

CHADWICK, J.—This action was originally brought to foreclose a mortgage for \$9,000. The mortgage was made to secure six notes, for \$1,500 each, payable annually with interest at the rate of seven per cent per annum. After default in the first two semiannual interest installments, action was begun to foreclose the mortgage, and upon issue joined a decree of foreclosure was ordered entered. Between the trial in January, 1910, and March, 1910, when the decree was entered, a principal note, in the amount of \$1,500, became due, a decree for the amount then due was entered, and appeal was taken to this court. The judgment was affirmed. *Naden v. Christopher*, 62 Wash. 413, 113 Pac. 1116. When the remittitur went down, the appellants paid into the clerk of the court the sum of \$2,764.75, being the full amount then due under the decree as theretofore entered. The original findings of fact provided:

“That the principal of the 2nd, 3rd, 4th, 5th, and 6th notes hereinbefore in paragraph 9 of these findings set forth, is not yet due according to the terms of said notes, nor is there due thereon interest accruing thereon from and after the 15th day of January, 1910, and that none of the notes in this paragraph identified, nor interest accruing thereon from and after the 15th day of January, 1910, have been paid.”

And as a conclusion of law, the court found:

"Said decree also to provide that this court shall, after the entry of decree herein, entertain an application to ascertain whether or not said property can be sold in parcels, and that if upon said application it be found by this court that said property can be sold in parcels without injury to the interests of the parties, that this court shall direct so much only of the premises to be sold as will be sufficient to pay the amount now due under said mortgage, with costs as above set forth, and that said judgment and decree shall remain and be enforced in the event of default in the payment of the principal of the 2nd, 3rd, 4th, 5th and 6th of the notes in paragraph 9 of the findings of facts herein set forth, or any of said notes, or upon default in the payment of the interest on said notes or any part thereof, unless the amount due as hereinabove set forth shall be paid before the execution of said judgment or decree is perfected; . . ."

After the payment of the amount due at the time the decree was entered had been made, the respondent filed a petition in the lower court, setting forth the fact that other installments had become due, and asked the court to ascertain whether the property could be sold in installments, and if not that a general order of sale should issue. This proceeding was vigorously assailed by the appellants. Upon the hearing, the court decided that the property could not be partitioned and sold, and accordingly decreed a sale of the whole thereof. It is contended that the original proceeding lapsed and became satisfied by the payment of the amount first found to be due, and that the court was without jurisdiction to entertain the subsequent proceeding, and that its order to pay was void and operates to deprive the appellants of their property without due process of law. We may admit that this would ordinarily be so. Where a mortgage debt is divisible, and an action is begun or is about to be begun for the recovery of a part thereof, the payment of that part will arrest the right of the mortgagee to prosecute a foreclosure. But our statutes intervene to modify, if not to entirely abrogate, this ancient rule.

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It seems to have been the object of our statute, Rem. & Bal. Code, §§ 1126, 1127, 1128, to make statutory that which had frequently been determined under the general equity powers of the court; that is, to allow a decree to be entered, judicially determining the amount then due and to become due, and to provide for subsequent orders of sale to satisfy maturing installments. The statute is no broader than the equitable power of the court. The fact that the statute provides that the whole of the mortgaged property may be sold to satisfy the installment due, if the court finds it to be impracticable to sell in parcels, and that the final judgment shall direct at what time and upon what default any subsequent execution shall issue, would indicate that the law contemplates but one foreclosure proceeding, and that all subsequent proceedings tending to the issuance of an execution or the satisfaction of maturing installments are merely matters of detail or in sequence of the original decree. The effect of the decree in this case was to establish the validity of the notes and the mortgage, and the subsequent procedure is for the protection of the mortgagee and is not against his interests. *Bank of Napa v. Godfrey*, 77 Cal. 612, 20 Pac. 142; *Rice v. Cribb*, 12 Wis. 198.

Section 1127 of the code, if taken alone and literally, might give color to the contention of the appellants that the payment of the amount found due upon rendition of the first decree discharged the whole case, and that respondent's only remedy for subsequent default is another foreclosure proceeding. The words "and the judgment shall remain and be enforced upon any subsequent default unless the amount due shall be paid before execution of the judgment is perfected," must be taken in connection with § 1126, which clearly provides that such payments shall only stay proceedings pending a subsequent default "of principal or interest thereafter becoming due." These statutes are in force in many states, as will be seen by reference to 2 Jones on Mortgages (6th ed.), §§ 1317-1367. We shall not under-

take to review or analyze the many cases to which we might refer, for, as we construe our statute, it is conclusive. But taking the California cases as a type, we think the purpose and construction of these statutes are there sufficiently set forth to illustrate and sustain our ruling. *San Jose Ranch Co. v. San Jose Land & Water Co.*, 126 Cal. 322, 58 Pac. 824; *Higgins v. San Diego Sav. Bank*, 129 Cal. 184, 61 Pac. 943; *Bank of Napa v. Godfrey*, *supra*.

It is nevertheless insisted that, when the appellants paid the amount then due upon the judgment, no further order of sale could be made, unless there was also entered another lawful decree; that it was not within the power of the court to enter an original judgment for any sum other than the amount then due; that the power to sell was stopped by payment, and that any further proceedings must be founded on and provided for in the decree, and there cannot be any order in the nature of a second judgment in the same proceeding. As an abstract proposition, we can admit all that plaintiff contends; but, as we have undertaken to show, our statute is controlling. The court has rendered one decree and the only purpose of the subsequent proceeding is to determine the amounts due as they mature. The statute is probably broad enough to warrant an execution for maturing installments without invoking the rule of the court. In any event, the rule did not work to the injury of the appellants, and they cannot complain. We have reviewed the cases submitted by appellants to sustain their contentions, and in our judgment they do not militate against our present judgment. If any of them seem to do so, it will require no more than casual reading of the case to show that it was decided without reference to a controlling statute. On the other hand, we conceive the cases of *Rice v. Cribb*, 12 Wis. 198; *Skelton v. Ward*, 51 Ind. 46; *Chicago & V. R. Co. v. Fosdick*, 106 U. S. 47, as well as other authorities relied on, sustain and support the judgment of the lower court.

It is said that the effect of this ruling will be to deny to

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appellants valid and subsisting defenses to the mortgage. This may be so, in so far as such defenses may have existed at the time the original decree was entered; for the decree, having the force of any other judgment, appellants could not now set up a defense that might have been there urged. In other words, the validity of the notes and mortgage was conclusively established. This we think would be the rule, although we hold that the appellants have a defense going to the validity of or arising out of the mortgage that had not been set up in the main action. For an existing defense not pleaded on foreclosure of an installment could not be set up on foreclosure of a subsequent installment. If appellants have a defense which has accrued subsequently, they might have set it up in opposition to respondent's motion for an execution; or having failed to do this, might, if otherwise sustained by legal principles, maintain a separate action.

We think the proceeding in the lower court was strictly in accord with the letter and spirit of the statute, and the order and judgment of the court is therefore affirmed.

DUNBAR, C. J., GOSE, PARKER, and CROW, JJ., concur.

[No. 9596. Department One. March 22, 1912.]

WALSH LUMBER COMPANY, *Respondent*, v. W. G. CHANEY,
Appellant.¹

PLEADINGS—AMENDMENTS—MISTAKE. In an action upon an account, in which the defendant alleged an assignment by him and substitution of the assignee, and also sought an accounting alleging a balance due to defendant, plaintiff's failure to reply to the defense of substitution is inadvertence that may be cured by amendment, especially where defendant offered no objection to the appointment of a referee to take the account.

REFERENCE—APPROVAL OF REPORT—TRIAL—AMENDMENT OF PLEADINGS. A referee to take an account being obliged to receive all the evidence offered, which is returned to the court with the objections

¹Reported in 122 Pac. 10.

and exceptions, the affirmance of a report of the referee, who allowed an amendment to the pleadings, amounts to an allowance of the necessary amendment to admit the proofs received.

REFERENCE—TRIAL—AMENDMENT OF PLEADINGS. A referee to take an account and hear the case on the merits may allow amendments to the pleadings, subject to review for abuse of discretion only.

APPEAL—REVIEW—HARMLESS ERROR—OBJECTIONS WAIVED. Error cannot be predicated upon a referee's allowance of an amendment to the pleadings, where the party was not misled and offered evidence on the issue, and did not make the specific objection in opposing affirmation of the referee's report.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered September 17, 1910, upon findings in favor of the plaintiff, in an action on account, upon approving the report of a referee to take an account. Affirmed.

W. C. Jones, for appellant.

Skuse & Morrill, for respondent.

FULLERTON, J.—The respondent brought this action against the appellant alleging that the appellant was indebted to the respondent in the sum of \$1,583.83, upon an account for goods sold and money advanced for the use of the appellant between May 1, 1909, and October 1, 1909, an itemized statement of the account being attached to the complaint as an exhibit. To the complaint, the appellant answered, making certain denials, and alleging affirmatively that all of the items charged against the appellant (except certain ones not material to be stated here) were made, charged, and credited in the execution of a certain contract, whereby the appellant agreed to cut and deliver to the respondent all of the saw timber in excess of a stated dimension on two certain homesteads named in the contract. The contract further provided that the respondent should furnish such camp supplies as should be necessary, and pay such pay checks as the appellant's timekeeper should issue, all of which such sums to be charged to the appellant's account; the con-

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tract specially providing that the appellant was to be financially responsible for the fulfillment of the contract, and in case there was any loss to stand such loss. It was then alleged that, in the execution of the contract, plaintiff and defendant had extensive dealings, and that the determination of the rights of the parties involved the examination of long and complicated accounts which had never been settled, and that, upon the examination and settlement of such accounts, the respondent would be found indebted to the appellant in a sum in excess of nine hundred dollars. Further answering, the appellant alleged that on "to wit, the 28th day of June, 1909, at the express instance and request of the plaintiff, defendant assigned, transferred, and set over unto one Harry Sadler all his rights and interest in and to said contract, and plaintiff then and there accepted said Sadler as the assignee of this defendant and agreed to hold him, and not this defendant, liable for any charges or advances made by plaintiff on account of said written contract."

The prayer of the answer was for a full and complete accounting and settlement of all accounts between the parties, and that the appellant have judgment for any amount found due him on such accounting. No reply was filed to the answer. Afterwards the cause was brought on for trial before the superior court, and the taking of testimony commenced, when the court discovered that the taking of an account would be necessary in order to determine the rights of the parties, and referred the case to a referee to take and report the evidence into court, with his finding and conclusions thereon.

On the trial before the referee, the Harry Sadler named in the appellant's answer was called as a witness by the respondent, and asked whether or not he had taken an assignment of the contract between the respondent and the appellant and assumed responsibility for the advances and charges which had been made thereunder. To this question, the appellant objected on the ground that it was not an issue

in the case; that it stood admitted in the pleadings, since it was so alleged in the answer and not denied by a reply. The referee indicated that he thought the objection was well taken, but stated that under the statute he was obligated to take down all testimony offered on either side, and allowed the witness to answer. Some question was thereupon made as to the date of the assignment, when the following took place:

"Mr. Jones: I suppose we can amend that by interlineation. The Referee: You wish to amend paragraph 8 by putting in the 28th of June, instead of the 22nd? All right. Mr. Morrill: Now at this time, having amended, I wish to reply to that amended complaint. Mr. Jones: Well, I will withdraw the amendment. I withdraw any application to amend the complaint—or the answer. Mr. Morrill: At this time, the defendant having asked to amend his answer, as to paragraph 8, to allege the 28th day of June, 1908, instead of the 22nd day of June, 1908, the plaintiff at this time asks leave to reply thereto, and does reply with a general denial, denying each and every part thereof. Mr. Jones: The defendant withdraws any request to amend the answer in any particular; and objects to plaintiff filing a reply or an amended pleading at this time, as requested, first, because the referee has no power to allow an amendment; second, because the new pleading sought to be introduced by the plaintiff changes the issues made by the pleadings as they now stand; third, the amendment suggested by defendant, by changing the date of the 22nd of June to the 28th, is a purely formal amendment, which may be made after trial, and in no wise affects the nature of the action or the defense. Mr. Morrill: Plaintiff objects to the withdrawal of the amendment for the reason that said amendment was asked for by the defendant and allowed by the court, by the referee, and it is therefore now too late to be withdrawn. The Referee: My opinion is, all you gentlemen can do is to make this record and leave these matters to be threshed out with the court. Mr. Jones: I don't suppose you can allow an amendment anyhow. The Referee: I doubt whether I have power to allow an amendment; I have some doubt about that."

Thereafter both sides offered additional evidence concerning the assignment, and at the conclusion of the case the ref-

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eree treated the allegation as denied, and found against the appellant on the question. The referee thereupon made an accounting between the parties, finding and concluding that the respondent was entitled to judgment against the appellant in the sum of \$1,339.93, and the costs of the action. The report was affirmed by the superior court, and judgment entered thereon accordingly.

The appellant bases his principal assignment of error on the ruling of the referee treating the allegation in the appellant's answer to the effect that there had been a substitution of parties to the contract as denied. He argues that a referee has no power to allow an amendment to the pleading, and that, were the rule otherwise, he could not allow a reply to be filed to an answer where none was originally filed. But the failure to file a reply in this instance was clearly an inadvertence or oversight on the part of the respondent. If there was a substitution of parties, as alleged in the answer, this alone constituted a complete defense to the respondent's cause of action; and there would have been no necessity for an accounting or reference to take an accounting, had it been supposed there was no issue on the question of substitution. The accounting was sought by the appellant himself. It was he who set up the contract and alleged that there had been mutual dealings between the parties necessitating the examination of a long account; and he made no objection to a reference after the court itself had entered upon the trial and found that to determine the issue the taking of an account was necessary. It is hardly possible that he would have submitted to the appointment of a referee had he thought that the allegation in his answer, which if confessed would have rendered an accounting unnecessary, was actually confessed. The statute provides, furthermore, that if evidence offered by either party shall not be admitted by the referee on the trial, and the party offering the same excepts to the decision rejecting such evidence, the exceptions shall be noted by the referee, and he shall take and receive such testimony and file

it with his report. Under this provision of the statute, the referee can be compelled to report all evidence that either party deems material to the matters in difference between the parties. The trial court can, also, on the hearing of the report, allow such amendments to the pleadings as it deems necessary to make the same conform to the evidence; and in this case, since the referee did take and report all the evidence offered by either party, the affirmance of the referee's report amounted to an allowance of the necessary amendment, and it is our duty to treat such amendment as actually made. Rem. & Bal. Code, § 1752.

We think also that a referee himself, where he is appointed to hear the case upon its merits and report the law and facts of the case to the court, may allow an amendment to the pleadings, and that his action in that regard is subject to review by the court for abuse of discretion only. Such is the holding in most jurisdictions, whose statutes are no more liberal than ours. 34 Cyc. 819, title Amendments.

But the appellant claims that he was denied his right to introduce evidence on this allegation of his answer by the referee's action, as he first indicated that no amendment could be allowed and changed his opinion only after the taking of evidence had been concluded. If the appellant has been misled by this action of the referee, then clearly he is entitled to have the cause remanded for a further hearing. But we are unable to find any support for the claim in the record. That he did offer evidence upon the question after the referee made the announcement, the report of the referee clearly shows. The record shows, also, that he opposed the affirmation of the referee's report in the superior court, but it does not show that he made this specific objection and took the ruling of the court thereon. This he was obligated to do to make the error available here. If he was misled by the referee in this regard, he should have asked for another reference and leave to introduce further evidence on the particular issue. It is not enough to suggest in this court for the first time the possibility that

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he was misled. It was within his power to show the fact, and without such a showing the appellate court must presume the fact did not exist.

The appellant takes exception to certain facts found by the referee, but we are satisfied that he found according to the weight of the evidence upon all the disputed points. There was clearly no substitution of parties, and the evidence convinces us, also, that the differences between the parties arising from the scale of the logs was settled by the allowances made to the appellant on that account by the respondent.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 10017. Department One. March 22, 1912.]

ALBERT DALTON *et al.*, Respondents, v. SELAH WATER
USERS' ASSOCIATION, Appellant.¹

WATERS AND WATER COURSES—IRRIGATION CANAL—DAMAGES FROM FLOODING—NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR. A finding of negligence in attempting to repair an irrigation canal on a hillside, by putting in plank side lining to protect a weakened side, is sustained, and the doctrine of *res ipsa loquitur* applies, where it appears that a mass of earth 12 to 16 feet in thickness and 170 to 180 feet in length, broke from the lower side of the canal, that a few days before the break, defendant undertook to put in a side lining of planks, tamped with a four-inch space of loose earth, that a witness found the earth washed out and soft and notified the defendant that the bank would break, but defendant paid no heed to the warning, and it appears that the court viewed the premises and the break was due to the force of the water and condition of the bank, rather than any outside intervening cause.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered July 6, 1911, upon findings in favor of the plaintiff, in an action for damages for flooding occasioned by the breaking of an irrigation ditch. Affirmed.

¹Reported in 122 Pac. 4.

Davis & Morthland, for appellant.

Snively & Bounds, for respondents.

Gose, J.—Action for damages. Judgment for plaintiffs. Defendant appeals.

The facts, in brief, are as follows: On the 10th day of August, 1910, the appellant owned and operated a canal, in Yakima county, which carried a large volume of water which was used for irrigation purposes. The respondents owned land about one mile from the canal. The elevation of the canal is 300 or 400 feet above the respondents' land. On the night of August 10, a mass or block of earth, twelve to sixteen feet in thickness and 170 to 180 feet in length, broke from the lower side of the canal and swung out like a gate, leaving an opening about twenty-five feet in width, through which the waters of the canal escaped and flowed over and upon the respondents' land, causing the loss for which a recovery is sought in this action.

The appellant had put side lining at the point of the break, along the lower bank of the canal, a few days before the break occurred. The canal at this point was cut into the side of a hill. The hill formed the upper bank, and the dirt taken from the cut formed the lower bank or side of the canal. In putting in the side lining, a trench was made, twelve to fourteen inches in width and eighteen inches in depth. Planks four inches square were placed four feet apart in the bottom of the trench against the lower side of the canal. To these were nailed rough boards sixteen feet in length, twelve inches in width, and one and one-half inches in thickness, and extending from the bottom of the trench to the top of the lower bank of the canal. The dirt taken from the trench was then tamped on the inside of the lining, and from time to time dirt was thrown into the four-inch space between the upright timbers and the lower bank of the canal, and puddled. On the question of negligence, the lower court found:

“That prior to the 10th day of August, 1910, the defend-

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ant attempted to repair a portion of the said ditch by cleaning out the bottom thereof and by constructing side-lining along a portion of one of the sides thereof; that the said ditch at the point where it broke, as hereinafter referred to, was constructed along the side of a hill; that in putting in said side-lining, a trench was dug along the bottom and at the outer edge of the ditch from eighteen inches to three feet in depth to hold the side-lining; that the said trench was dug in such a negligent manner, and the side-lining so negligently placed therein, that the water, when turned into said ditch, softened the soil in the bottom and in said trench and the outer side of said ditch that it would not hold the water when it was turned in, and the side split off and allowed the whole volume of water in said ditch to escape and run down on to the premises of the plaintiffs; that the weak and softened condition of the bank of said ditch was called to the attention of the defendant prior to said break, and the defendant had full knowledge of such condition; . . .”

The appellant contends, that this finding is not supported by the evidence; that there is no evidence of negligence, and that the doctrine of *res ipsa loquitur* cannot be applied to cases of this character. Before considering this question, it seems proper to say that the findings recite that the trial judge, upon the stipulation of the parties, viewed the canal at the point where the break occurred, and further recite that the findings are based upon the evidence and the view made by the court.

We think there is ample evidence to sustain the finding. It would seem that nothing but a convulsion of nature or the negligence of the appellant could cause such a mass of earth to break away from the canal. A witness for the respondents, Mr. Baird, however, testified that he was at the point of the break two or three days before the break occurred; that he stepped upon the bank where they had placed the side lining, and that he “just simply dropped down; right through into the side lining; the bank of the side lining and the main bank: It seemed to be a lot of gravel thrown on top, and underneath it was nothing. It seemed to be all washed away—

soft; and I just went right down. . . . Well, I went clear over my knees." He further stated that the place where he stepped was between the side lining and the lower bank of the canal, and that the bank broke a few feet above this point. He testified further that he told the appellant's superintendent of the condition of the bank; that it was "going to break," and said to him that he should give it his attention; and that the superintendent answered, "Who is running that ditch?" The break occurred the first or second night following this communication. The superintendent testified that he did not remember the conversation. This testimony, when considered with the physical facts and the view made by the court, clearly sustains the finding. It seems proper to say that the court viewed the break some nine months after the accident happened. The physical facts were, however, still present. The appellant had then put in a flume at the point where the earth broke away from the canal. The appellant seeks to exculpate itself from the charge of negligence by testimony that the lining was properly installed, that the canal was patrolled daily, and that the patrolmen did not discover any indication of infirmity in the bank where the break occurred. This does not exonerate the appellant from liability. The evidence is that the water could pass through the space between the horizontal boards. If the witness Baird observed and foretold the danger, the patrolmen could have seen it had they given it a reasonable inspection.

If the break had been of a character that it could reasonably be said to have been caused by the recent burrowing of an animal, or by a trespasser, or if the manner and circumstances of the accident were consistent with reasonable care upon the part of the appellant, and there was no evidence of negligence other than the happening of the accident, a different question would be presented. We think the circumstances are such as to make the negligence of the appellant a legitimate if not an irresistible inference.

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We think the better rule is that the doctrine of *res ipsa loquitur* applies in cases of this character. In *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838, in speaking of this doctrine, it is said:

"The maxim of *res ipsa loquitur* may be termed a rule of evidence, to the extent that, when properly applied, it raises a presumption of negligence sufficient to make a *prima facie* case on behalf of the plaintiff, and call for an explanation from the defendant."

In *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 82 Am. St. 630, 52 L. R. A. 922, it is said:

"It is not the accident, but the manner and circumstances of the accident, that justifies the application of the maxim." See, also, 3 Farnham, Waters and Water Rights, § 134; 6 Thompson, Negligence, § 7636; 2 Cooley, Torts (3d ed.), p. 1425; *City Water Power Co. v. City of Fergus Falls*, 113 Minn. 33, 128 N. W. 817; *Gould v. Winona Gas Co.*, 100 Minn. 258, 111 N. W. 254, 10 L. R. A. (N. S.) 889.

This maxim, like all other rules of evidence, must be applied with reference to the facts of the particular case. The breaking of the banks of a canal is but a circumstance, and its probative force must be determined from all the facts and circumstances surrounding its occurrence.

Where the trial judge views the premises upon the stipulation of the parties, it of course becomes his duty to weigh the evidence in the light of all pertinent facts that fall within his observation; and in such cases, if there is a substantial conflict in the testimony, this court would be reluctant to interfere with his finding.

Affirmed.

DUNBAR, C. J., CHADWICK, CROW, and PARKER, JJ., concur.

[No. 9947. Department One. March 25, 1912.]

**GATE CITY LUMBER COMPANY, *Respondent*, v. THE CITY OF
MONTESANO, *Appellant*.¹**

MUNICIPAL CORPORATIONS—PUBLIC WORK—FAILURE TO TAKE BOND—LIABILITY FOR MATERIAL—DELIVERY—EVIDENCE—SUFFICIENCY. In an action against a city by a materialman to recover for lumber sold and shipped to the contractor, the city having failed to take a bond for the protection of materialmen, the plaintiff is not precluded from recovery by the fact that the actual delivery of the lumber from the cars to the work was made by the employees of the contractor, where it sold and delivered the same to the contractor for use in such work, and it was actually used therein.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered June 20, 1911, upon findings in favor of the plaintiff, in an action to recover for lumber sold for use in a public improvement. Affirmed.

O. M. Nelson, for appellant.

W. H. Abel, for respondent.

PER CURIAM.—This action, which was commenced by Gate City Lumber Company, a corporation, against the city of Montesano, the Montesano Planing Mill Company, a corporation, and George Everett, its receiver, to recover the purchase price of lumber sold, and to establish the statutory liability of the city therefor, has heretofore been in this court, and a statement of the issues may be found in our former opinion reported in 60 Wash. 586, 111 Pac. 799. After remittitur, the cause was again tried for the sole purpose of ascertaining the value of the material actually used in the performance of the contract, or that was delivered at the work. The trial judge found that 65,294 feet of lumber, of the total value of \$587, had been so delivered, and entered judgment for that amount, with interest thereon. The city has appealed.

¹Reported in 122 Pac. 26.

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Syllabus.

The controlling question on this appeal is whether the findings are sustained by the evidence. We think they are. It was clearly shown that three carloads of lumber had been sold to Montesano Planing Mill Company by respondent; that it had been shipped to Montesano; that 65,294 feet thereof had been delivered at the work, at the place where the Planing Mill Company was performing its contract with the city, and that it was thus delivered for use in filling the contract. Appellant contends that the men who did the hauling from the cars were employees of the Planing Mill Company; that respondent only made its delivery on the cars at Montesano, and that it did not actually deliver the lumber at the work. The questions to be determined were whether the material was sold by respondent for use in the contract, and whether it was actually delivered at the work for such use. It was so sold and delivered, and the mere fact that the teamsters who did the hauling were employed by the contractor, would not deprive respondent of its right of recovery herein.

The judgment is affirmed.

[No. 9605. Department Two. March 25, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. A. D. BAKER,
Appellant.¹

CRIMINAL LAW—TRIAL—MISCONDUCT OF JURY. In a prosecution for violation of the local option law, it is not misconduct on the part of the jury that, on an issue as to the intoxicating character of the liquors, the jurors smelled and tasted the contents of samples of the liquor, received in evidence as exhibits, and taken into the jury room without objection.

INTOXICATING LIQUORS — SALES — LOCAL OPTION — CHARACTER OF LIQUORS—EVIDENCE—ADMISSIBILITY. In a prosecution for selling liquor in a dry unit in violation of the local option law, samples of liquor taken from defendant's place of business a few days after

¹Reported in 122 Pac. 335.

the unlawful sale, are admissible in evidence as tending to show the character of his business, the samples being in the same condition as when taken.

APPEAL—REVIEW—HARMLESS ERROR. In a prosecution for violating the local option law, it is harmless to receive in evidence the certificate of a Federal internal revenue collector that a special tax stamp had been issued to defendant as a retail liquor dealer, where defendant testified that he had purchased such a tax stamp.

INTOXICATING LIQUORS—LOCAL OPTION—SALES—EVIDENCE—ADMISSIBILITY. In a prosecution for unlawful sales of intoxicating liquors shipped into dry territory, expense bills and freight receipts issued by a railway agent tending to show shipments of casks of bottled beer from a brewery to defendant, are admissible in evidence, although only carbon copies, where the originals had been delivered to the defendant and could not be produced, and the casks had been delivered to him by a drayman.

EVIDENCE—OPINION—EXPERTS—INTOXICATING LIQUORS. An expert chemist may testify as to his analysis of beer, and state his opinion as to whether it was intoxicating.

CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE. It is not prejudicial misconduct on the part of the court to call a deliberating jury at about 9 o'clock Saturday evening and to intimate that he might be required to keep them over Sunday if they could not agree by midnight, where the jury returned a verdict more than two hours before midnight.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered January 31, 1911, upon a trial and conviction of selling liquor within a dry unit in violation of the local option law. Affirmed.

Jesseph & Grinstead, for appellant.

Howard W. Stull, for respondent.

CROW, J.—A. D. Baker was convicted of selling intoxicating liquor in a dry unit in Stevens county, in violation of the local option law, chap. 81, Laws of 1909, and has appealed.

During the trial, two bottles, exhibits 12 and 13, taken from appellant's place of business located within the dry unit, and which the state alleged contained intoxicating liquors, were admitted in evidence. A portion of the contents of each had been analyzed by an expert chemist. After

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making his analysis, he sealed the remaining contents in the original bottles. One bottle had been filled by the sheriff from a keg containing wine found in appellant's place of business. The other, claimed to contain beer, was filled, sealed, and unopened when found by the sheriff at the same time and place. The evidence was sufficient to show that appellant, by his authorized agent, had made a sale of beer from a similar bottle to the prosecuting witness. The jury, without objection, were permitted to take these sealed exhibits to the jury room. It was afterwards shown that they opened them and smelled and tasted their contents. Appellant contends that in so doing they were guilty of misconduct, and that their verdict was returned upon private knowledge thus obtained and not upon competent evidence admitted during the trial.

The trial judge, in the exercise of his discretion, might have permitted the jury to smell and taste the contents of the bottles during the trial, without requiring them to do so. This was not done, but the bottles were sent to the jury room without objection on the part of appellant, and the jurors naturally supposed it would be proper for them to make any reasonable examination of their contents. The issue was whether the liquor, especially that in the bottle alleged to contain beer, was intoxicating. If the jurors might have been permitted to smell and taste the liquor during the trial, we fail to understand how the occurrence here complained of amounted to misconduct. That on a trial of this character jurors might be permitted to smell and taste the liquor see *Schulenberg v. State*, 79 Neb. 65, 112 N. W. 304; *People v. Kinney*, 124 Mich. 486, 83 N. W. 147; *Reed v. Territory*, 1 Okl. Cr. 481, 98 Pac. 583, 129 Am. St. 861; *State v. McCafferty*, 63 Me. 223. There is a conflict of authority on this question, but the cases cited meet with our approval.

Appellant further contends the trial judge erred in admitting these exhibits 12 and 13 in evidence. It was shown that the contents were in the same condition as when taken,

save that a small portion had been removed for analysis. These liquors, claimed to be intoxicating and found in appellant's place of business, were admissible as tending to show the character of his business, notwithstanding the fact that they were seized a few days after the date of the alleged unlawful sale. *Starbeck v. State*, 53 Tex. Cr. 192, 109 S. W. 162; *Klepfer v. State*, 121 Ind. 491, 23 N. E. 287.

It is contended the trial judge erred in admitting a letter from the United States internal revenue collector, in which, under seal, he certified that a special tax stamp had been issued to appellant as a retail dealer in malt liquor. This instrument was offered under § 20 of the local option law. Appellant contends it was not a certified copy and was therefore incompetent. Without passing upon the sufficiency of the certificate, we hold its admission, if error, could not have been prejudicial, as appellant himself testified that he had purchased and paid for such a special tax stamp, or license, and that it had been issued to him.

A number of expense bills and freight receipts, issued by an agent of the Idaho & Washington Northern Railway Company, tending to show shipments of casks of bottled beer from the Inland Brewing & Malting Company of Spokane to the appellant, were admitted in evidence. Appellant contends that they were incompetent; that they were not originals, and that they did not tend to show any sale of intoxicating liquor as charged. Other evidence discloses the fact that, by using carbon sheets, these receipts and bills were made at the same time as the originals which had been delivered to appellant, and could not be produced by the state; and that the casks had been delivered at his place of business by a drayman who did his hauling and whom he paid. Upon the charge of selling intoxicating liquors these facts, and the exhibits were competent evidence as tending to show the character of appellant's place of business and the business which he was transacting. If he was receiving barrels of bottled liquors, shipped into dry territory by a Spokane brewing com-

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pany, under the name of beer, and causing the same to be delivered at his place of business, the natural inference would be that he was doing so for some unlawful purpose, in violation of the local option law.

It is complained that the expert chemist who made the analysis above mentioned was permitted to testify to the result of his tests, and to express his opinion as to whether the liquor in the bottle claimed by the state to have contained beer was intoxicating. This evidence was competent. *Mayne v. State*, 48 Tex. Cr. 93, 86 S. W. 329; *Poston v. State*, 83 Neb. 240, 119 N. W. 520; *State v. Wills*, 106 Mo. App. 196, 80 S. W. 311.

The jury retired to deliberate upon their verdict at four o'clock on Saturday afternoon. The record shows the following:

"Thereafter, to wit, at 9:05 p. m., the jury was again called into court by direction of the judge thereof, and the following proceedings were had and done: The Court: Mr. Foreman, have the jury arrived on a verdict as yet? The Foreman: We have not. The Court: Is there a probability they might arrive on a verdict before twelve o'clock? The Foreman: There is a possibility, but I can't say as to the probability. The Court: I want to say this to you, that I have the authority to receive a verdict from the jury in this case, of guilty or not guilty Sunday, but I have no authority to receive a disagreement, and I am not going to keep you after twelve o'clock tonight, but I wish that you would do your best to arrive at a verdict if you can. I have no right to press you or push you, nor to in any way interfere with your consideration of the case, but if at that hour you make up your mind that you cannot agree in the case that will be the fact, I will hear you. If there is a possibility at that hour you might agree upon a verdict, I would keep you longer; that is, if the possibility is a strong possibility. I call you to give this notice to you in the event that it might aid you in your work. You may now retire to your jury room. Mr. Jesseph (counsel for appellant): I want to take an exception to the instructions your honor has given the jury at this time, on the ground and for the reason that they are prejudicial to the defendant."

Appellant insists that this was misconduct and error; that it was the duty of the court to permit the deliberations of the jury to proceed without interruption; that by the language used it was intimated they might be compelled to remain together over Sunday, and that by his statement he coerced the jury and unduly hastened their deliberations. The trial judge misstated the law as to his right to discharge the jury on Sunday, if convinced of their inability to agree. *State v. Lewis*, 31 Wash. 515, 72 Pac. 121. Were the law as stated by him, we would find no merit in this contention. The jury returned a verdict at nine forty-five p. m., more than two hours before midnight. There was no undue interference with their deliberations. *State v. Lash*, 225 Mo. 556, 125 S. W. 464; *Jones v. State*, 117 Ga. 710, 44 S. E. 877; *Gebhardt v. State*, 80 Neb. 363, 114 N. W. 290; *Terry v. State*, 50 Tex. Cr. 438, 97 S. W. 1043; *Sandefur v. Commonwealth*, 143 Ky. 655, 137 S. W. 504.

Other objections are made to evidence admitted, and it is also contended that the prosecuting attorney was guilty of misconduct in his argument to the jury. Without discussing these assignments, we state our conclusion that they are devoid of merit.

The appellant has been awarded a fair trial, the evidence was sufficient to sustain the verdict, and the record shows no prejudicial error. The judgment is affirmed.

DUNBAR, C. J., MORRIS, CHADWICK, and ELLIS, JJ., concur.

[No. 10092. Department One. March 25, 1912.]

NATIONAL SURETY COMPANY, *Appellant*, v. BRATNOBER
LUMBER COMPANY *et al.*, *Respondents*.¹

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY—SEVERAL CLAIMS—MONEY JUDGMENT—ACTION ON BOND. In an action by the surety on a bond to indemnify materialmen and laborers upon public work, brought to establish the amount of its liability on various claims filed, in which judgment was given to the claimants upon their respective cross-complaints, no appeal lies in the case of any cross-complainant in whose favor judgment was given for less than the sum of \$200, that being the jurisdictional amount on appeal to the supreme court in case of judgment for the recovery of money only.

MUNICIPAL CORPORATIONS—PUBLIC WORKS—BONDS TO SECURE LABORER AND MATERIALMEN—SUBJECTS INCLUDED—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 1159, requiring contractors on public work to furnish a bond to pay all laborers, mechanics, subcontractors and materialmen and all persons who shall supply such persons with provisions or supplies for carrying on such work, all just debts, dues and demands incurred in the performance of the work, the liability on the bond is not limited to such provisions and supplies as enter into and become a part of the finished product, as in the case of liens under the lien laws of the state, notwithstanding that there is an analogy between the two laws; and the legislature has power to so provide.

STATUTES—TITLE AND SUBJECTS. The title, an act requiring bonds from contractors on public work conditioned to pay laborers, mechanics, materialmen, and others, is sufficiently broad to include provisions to indemnify parties furnishing "supplies and provisions" for carrying on the work, although such supplies or provisions did not enter into or become a part of the finished improvements; the doctrine of *sui generis* not applying in such case to the words "and others."

SAME. A bond under Rem. & Bal. Code, § 1159, to indemnify laborers, mechanics, subcontractors and materialmen, and all persons supplying such persons with provisions or supplies for carrying on the work, covers fuel for a steam shovel used in excavating; also the services performed by teams with drivers furnished to the contractor, together with hay and grain to feed the horses.

¹Reported in 122 Pac. 337.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered November 13, 1911, upon findings establishing plaintiff's liability upon a bond given for the protection of materialmen and laborers upon city work, after a trial to the court. Dismissed in part, and affirmed in part.

John W. Roberts and *George L. Spirk*, for appellant.

Lyter & Folsom, for respondent Wainwright & McLeod.

James B. Howe and *Hugh A. Tait*, for respondent Seattle Electric Company.

J. H. Allen, for respondent Chas. H. Lilly Co.

Palmer & Askren, for respondents Gholson & Muncy.

Byers & Byers, for respondents John L. Craib and Henderson Saddlery Co.

Martin J. Lund, for respondent Charles Hansen.

Tucker & Hyland, for respondent Cornwall & Sons.

Herchmer Johnston, for respondent Washington Hay & Grain Co.

PARKER, J.—On December 7, 1909, Paul Steenstrup entered into a contract with the city of Seattle for the construction of a public street improvement. To secure the faithful performance of the contract, and also to secure the claims of laborers, mechanics, materialmen, and others furnishing labor, material, provisions and supplies, for the carrying on of the work, he executed a bond to the city in the sum of \$22,000 conditioned as required by chapter 207, § 1, p. 716, Laws of 1909; Rem. & Bal. Code, § 1159, which provides that contractors in such cases shall furnish a bond conditioned that they will:

“Pay all laborers, mechanics, and subcontractors and materialmen, and all persons who shall supply such person or persons or subcontractors, with provisions and supplies for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work.”

The National Surety Company became surety upon the bond so furnished by Steenstrup. During the progress of the construction of the improvement, numerous claims were filed with the city for work, provisions, and supplies claimed to have been furnished to Steenstrup for the carrying on the work. These claims were so filed as the law provides, as a prerequisite to the rights of the several claimants to maintain actions therefor against the surety company as surety upon the bond. The surety company, in order to procure an adjudication of these claims and the extent of its liability therefor as surety upon the bond, commenced this action in the superior court for King county, against all of the claimants, seeking to have them all brought into the action and required to litigate their claims therein. The owners of the claims here involved, as well as others, appeared and set up their several claims by cross-complaints. From judgments in their favor against the surety company, it has appealed to this court. While the judgments are all evidenced in one writing, signed by the court and so entered, they are in effect separate judgments in favor of each claimant against the surety company.

A number of respondents whose separate claims and judgments thereon amount to less than \$200, have moved to dismiss the appeal, in so far as it is sought thereby to reverse the judgments which are in their favor. These motions are rested upon the ground that this court has no jurisdiction to entertain an appeal from these judgments, because the amount involved therein, in each case, is less than \$200; since there is nothing involved except the recovery of money, the same as if the several claimants were separately suing appellant upon the bond. It could hardly be seriously argued that if the claimants were attempting to recover the amount of their several claims from appellant by separate actions, that there would be any appeal allowable from the judgments in favor of those whose claims are less than \$200. *State ex rel. Gillette v. Superior Court*, 22 Wash. 496, 61 Pac. 158; *State ex*

rel. Wallace v. Superior Court, 24 Wash. 605, 64 Pac. 778; *State ex rel. Bassett v. Freasure*, 39 Wash. 198, 81 Pac. 688; *State ex rel. Plaisie v. Cole*, 40 Wash. 474, 82 Pac. 749; *State ex rel. Lack v. Meads*, 49 Wash. 468, 95 Pac. 1022; *Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670.

Now, does the mere fact that these claims are sought to be recovered in this one action enlarge the right of appeal of the respective parties, in so far as that right may be affected by the amount involved? It seems to us this question has been fully answered in the negative by the decision of this court in *Garneau v. Port Blakely Mill Co.*, 20 Wash. 97, 54 Pac. 771. It appears that the several claimants in that case had foreclosed their several logger's liens upon certain logs, and before the sale of the logs they had been converted by the mill company to its own use. Thereupon the several claimants, whose liens had been established by the decree, brought an action for damages against the mill company because of its appropriation of the logs, and having been successful in their damage suit against the mill company, it appealed to this court, when they moved for a dismissal of the appeal because the amount of each of their separate claims was less than \$200. Disposing of the motions in favor of the claimants, Justice Dunbar, speaking for the court, said:

"It is argued by the appellant that the plaintiffs, having submitted themselves to the jurisdiction of the court, and having stood ready to receive the benefits of the joint trial, are now estopped from raising the question of jurisdiction; but we do not think this argument is tenable. The law permits them to join in these trials simply for the purpose of convenience, and for the purpose of saving costs to all parties; but it does not, we think, affect any material right which any of the plaintiffs would have had had he brought an independent action and tried it independently. It is also urged that these actions depend upon a lien, and that, the establishment of the lien being the basis of the action, they do not fall within the constitutional inhibition; but it seems to us that the establishment of the lien is purely incidental,

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and that the action is a straight action for the recovery of money."

The only difference we see between that situation and this, is that, in form, the surety company is here the plaintiff. It is plain, however, that in substance the several claimants are the plaintiffs. Their several claims are affirmatively asserted by cross-complaints. Nothing else is involved, and the fact that appellant commenced the action, does not, it seems to us, change the nature of the controversy between them and appellant. Each claimant is after all simply attempting to recover the amount of his claim upon the bond, from appellant, and as between each claimant and appellant we see nothing more involved, than as if each claimant were suing separately in an action commenced by himself. It is true that, by direction of the court, these several judgments are to be satisfied from the fund still remaining in the hands of the city and due to Steenstrup upon the contract, in so far as that fund will go; but they are nevertheless personal judgments against the surety company, as prayed for by the claimants in their several cross-complaints.

We do not find in the record formal motions to dismiss the appeal made by all of the judgment creditors whose claims are less than \$200; but since the question has come to our attention, and it is jurisdictional, we conclude that the appeal must be dismissed as to all of the judgments rendered upon claims the several amounts of which are less than \$200. This leaves for consideration only those claims which involve more than \$200. These we will now notice.

The contentions of counsel for appellant against the several claims of respondents are rested upon the assumption that they are all for services, provisions and supplies of such nature as did not enter into or become a part of the finished improvement so that a right of lien therefor would have existed under the law if they had been rendered and furnished to an individual under like circumstances. In other words, that the items of such claims are not such as are secured by

the bond, because they would not be lienable items if the improvement had been constructed for a private person. We will assume, for the sake of argument, that the items here involved are of this nature, and will notice the general contentions of counsel for appellant based upon this assumption, before discussing the several claims separately.

It is argued, in substance, that we should approach the solution of this controversy and proceed along the same line of reasoning as if there were here involved the question of enforcing these claims as liens against the improvement and the land upon which it is situated. It may be conceded that laws of this nature, generally speaking, have for their object the securing of claims of mechanics, materialmen, and others, in lieu of lien laws which are not applicable to public improvement, and that the principles of construction applicable thereto are in substance the same. It does not necessarily follow, however, that we are to look to the statutory lien laws to determine as to whether or not a particular item is secured by such a bond. If the law providing for the furnishing of the bond also provides that only lienable items, as defined by the lien statutes, are to be secured thereby, then, of course, the lien statutes furnish the complete answer to the question of the validity of such claims as against the bond. This was the view taken by this court in *Clough v. Spokane*, 7 Wash. 279, 34 Pac. 934, where there is involved a claim for labor performed upon a public improvement for the contractor, and it was sought to hold the city of Spokane liable to pay for such labor because it had failed to take from the contractor a sufficient bond securing claims for labor performed upon the contract, as it was there insisted that the law required the city to do, and failing therein had rendered itself liable. A reading of that decision will show, however, that the court held in favor of the city because the law then in force relating to bonds of contractors upon public works, provided that such bonds should be given to secure laborers and others when the contract was for "any work of any char-

acter which, if performed for an individual, a right of lien would exist under the law" (Laws of 1887-8, p. 15; Hill's Code, Section 2415); and there being, at that time, no right of lien provided by statute for labor performed of the kind there involved, the court held that no bond of this nature was required; and hence, the city had violated no duty in failing to take from the contractor a sufficient bond. *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280. In the following decisions of this court, claims were held good as against the bond upon the theory that a right of lien would have existed therefor under the lien statutes if the improvement had been made for a private individual. *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345; *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; *Rounds v. Whatcom County*, 22 Wash. 106, 60 Pac. 139.

In 1897, the law involved in the decisions we above noticed was amended, when there was omitted therefrom the words, "Any work of any character which if performed for an individual a right of lien would exist under the law." Laws of 1897, p. 57; Ballinger's Code, § 5925. The law was reenacted in 1909 as quoted near the beginning of this opinion, and some other changes made therein with which we are not here concerned, so that, since 1897, the conditions of the bond required by the law have remained unchanged, and furnish the only statutory language descriptive of the nature of the claims secured by the bond. Since then it has not been a question of what a claimant's rights would be under the lien laws, if the improvements were being constructed for a private individual, though it may be that we should regard a claimant's rights in somewhat the same light as if we were testing his lien right against the property upon which the improvement is situated, and such lien right were defined by the language of the required statutory condition of this bond. This analogous lien right, which we are here considering, must be measured by those conditions. There is

now no other language in the law defining the claimant's rights. The law does not refer us to any lien right provided by law as a measure of a claimant's rights, as the law of 1887-8 did, which was involved in the decisions above noticed.

In support of their general contention that no claim is allowable under this law except for work performed directly upon the improvements and for material furnished for and to become a part of the completed improvement, counsel for appellant rely principally upon our decision in *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799. That was an action against the city to recover for lumber claimed to have been furnished to a contractor for the city to be used in the construction of a plank roadway; the city having failed to require of the contractor a bond as provided by this law, which fact under the law rendered the city liable to the same extent as the sureties upon such a bond. There was no question in that case but that the material claimed to have been furnished was of such nature as to come within the security of the bond, but the question was only as to whether or not, within the meaning of the law, the material had been furnished for the improvement. The language of the decision particularly relied upon is quoted by counsel from page 589 as follows.

"The question then arises, who is a materialman, and what is a just debt incurred in the performance of contract work, within the meaning of the act of 1909. In the case of *Fuller & Co. v. Ryan*, 44 Wash. 385, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein. See, also, *Foster v. Dohle*, 17 Neb. 631, 24 N. W. 208; *Weir v. Barnes*, 38 Neb. 875, 57 N. W. 750. We are not disposed to place a broader construction on the term *materialman*, and *just debts incurred in the performance of contract work*, under this statute. A more liberal construction would permit of the grossest frauds on the part of contractors, and is not necessary for the protection of *bona fide* materialmen. It appears from the testimony in this case that at least three different lumber concerns furnished ma-

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terial to be used in this roadway, and if a materialman brings himself within the terms of the statute by simply loading lumber on the cars at a distant point and billing it to the contractor without more, it can readily be seen that the contractor can mulct the city, or the sureties in case a bond is given, for the value of material many times in excess of the requirements of his contract."

This was said when there was nothing involved but the question as to whether or not the lumber had been actually furnished for the improvement. It is evident that, when the court restricted the meaning of the words "just debts incurred" etc., it only had in mind the question of whether or not the debt incurred for the particular lumber was incurred for the carrying on of the work, in view of the uncertainty of the fact of the lumber having been actually furnished for such purpose. We are quite unable to see anything in that decision which will aid us in determining the rights of the claimants here, who furnished "provisions and supplies for the carrying on of such work," to which class most, if not all, of these claimants belong. Other decisions of this court relied upon we think are even more easily distinguishable from the case before us.

Armour & Co. v. Western Construction Co., 36 Wash. 529, 78 Pac. 1106, was an action to recover for provisions consisting of meat, etc. furnished to a railway contractor. The right to so recover was rested upon the general lien law of 1893, Laws of 1893, p. 32, entitled "An act creating and providing for the enforcement of liens for labor and material." So far as the act provided for the securing of lien rights, it did not go beyond the title. It did, however, contain a provision for the furnishing of bonds by railroad contractors to secure "laborers, mechanics, materialmen, and persons who supply such contractors with provisions." In that case it was held that the provisions of the act relating to the furnishing of bonds by contractors to secure claims, was not within the title of the act; but related to an entirely different sub-

ject to that expressed in the title, and hence, the claim for provisions sought to be recovered under the bond provisions of the act could not be successfully maintained. In that case, the court also distinguishes between the words "material" and "provisions," and from the remarks there made upon that subject, it is evident that the court would not have enforced a lien for provisions under that act, since it gave only a lien for labor and "material to be used in the construction," etc., though the question there involved was not one of lien, but of the claimants' rights under the bond provisions of the act, not covered by its title.

Trutakawa v. Kumamoto, 53 Wash. 231, 101 Pac. 689, 102 Pac. 766, was an action to enforce a lien upon a railway for the value of groceries etc. furnished to a contractor while constructing the road, and involved the construction of the same law as in the *Armour* case, *supra*. That law, however, had been reenacted in 1905 after the decision of the *Armour* case (Laws of 1905, p. 229) without any change except the change in its title, which as reenacted read, "An act relating to liens for labor performed, material, provisions and supplies furnished." It will be noticed that the substance of this change amounted only to inserting in the title the words, "provisions and supplies." There was not inserted in the body of the act relating to liens, however, any additional provisions extending the lien right beyond what it had previously been, the language of the law still securing liens to "persons performing labor upon or furnishing material to be used in the construction" etc. and nothing more. It was held that the lien rights were not enlarged by this mere enlarging of the title. It was simply an instance of a title being broader than the plain terms of the act; hence, the enforcement of a lien for supplies was denied because they were not within the meaning of the word material as used in the act.

Hall v. Cowen, 51 Wash. 295, 98 Pac. 670, involved the right of a lien upon lots for the rental value of scrapers

rented to a contractor who used them in improving the lots by grading. This was claimed as a lien upon the lots under a statute giving a lien to one who "clears, grades, fills or otherwise improves," the lot or street in front of such lot. Clearly the owner of the scrapers did not clear, grade, fill or improve the lots, and was therefore held not to have a lien under that statute.

Gilbert Hunt Co. v. Parry, 59 Wash. 646, 110 Pac. 541, involved an attempt to enforce a lien under the general lien law, Rem. & Bal. Code, § 1129, securing as we have seen, liens to persons "performing labor upon or furnishing material to be used in the construction," etc. The only question there involved was as to the items furnished being lienable, and they not being either labor or material "to be used in the construction," within the meaning of the law, the enforcement of the lien was denied.

In the late case of *Akers v. Lord*, ante p. 179, 121 Pac. 51, there was an attempt to enforce a lien for what in no event could have been classed other than as supplies, under a statute which did not give a lien for provisions or supplies, and for that reason the claim of lien was held unenforceable. These decisions proceed upon the theory as stated in *Tsutakawa v. Kumamoto*, supra, that "the object of these statutes is to secure a lien to the laborer and materialmen for that which goes into the finished structure." In other words, when a statute uses only the words, "labor upon" and "material to be used in the construction," it is only contemplated thereby that liens are to be secured for labor performed upon and material going into and becoming a part of the finished structure.

We think this court has not yet been called upon to deal with and measure the rights of claimants such as are here involved, under a statute which makes a valid provision, in direct terms, for securing persons who furnish "provisions and supplies for the carrying on of such work," in addition to labor and material, as this law does. While this court, fol-

lowing the apparent weight of authority, has proceeded upon the theory that provisions and supplies are not lienable items in view of the fact that they are not by such statutes made lienable in terms, and do not enter into and become a part of the finished structure, it does not follow therefrom that the legislature may not provide for the securing of claims of this nature by lien, or by requiring from contractors bonds for that purpose. The fact that such provisions and supplies do not enter into and become a part of the finished improvement does not argue against the existence of legislative power to so provide. Such power has been frequently exercised by legislatures. *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67; *McLester v. Somerville etc.*, 54 Ala. 670; *Grants Pass Trust Co. v. Enterprise Min. Co.*, 58 Ore. 174, 113 Pac. 859; *Carson & Co. v. Shelton*, 128 Ky. 248, 107 S. W. 793, 15 L. R. A. (N. S.) 509; *Perry v. Duluth Transfer R. Co.*, 56 Minn. 306, 57 N. W. 792.

It is also argued that the rights of claimants under this law must be confined to claims for labor upon and material furnished to become a part of the improvement, as in lien cases, because the title of the act is not broad enough to include more. The title of the act is,

“An act requiring bonds from contractors, contracting to do public work, conditioned to pay laborers, mechanics, materialmen and others.” Laws of 1909, p. 716.

It is insisted that the word “and others” cannot be held to include those who furnish provisions and supplies, or in any manner to extend the provisions of the act beyond what it would have been had the words “and others” been omitted from the title. A somewhat elaborate argument is made in this behalf, rested largely upon the doctrine of *ejusdem generis*. It may be well doubted that this doctrine should be given that force in the construction of a title of an act that it ordinarily receives when we look for the meaning of doubtful language in the body of an act. The title is only for the purpose of pointing out in very general terms the subject-

matter of the proposed legislation. As was said in *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728:

"This court has often held that the title of an act, in order to comply with the constitutional provisions above quoted, need not be an index to the contents of the act; that the purpose of the title is to call attention to the subject-matter of the act so that any one reading it may know what matter is being legislated upon, and it is sufficient when it is broad enough to accomplish that purpose. For the various provisions constituting the act, the body of the act must be consulted, the title being neither expected nor required to give details."

In *State ex rel. Olsen v. Board of Control*, 85 Minn. 165, 88 N. W. 533, the court makes some very pertinent remarks touching the construction of a title of an act as follows:

"Every reasonable presumption should be in favor of the title, which should be more liberally construed than the body of the law giving to the general words in such title paramount weight. It is not essential that the best or even accurate title be employed, if it be suggestive in any sense of the legislative purpose. The remedy to be secured and mischief avoided is the best test of a sufficient title which is to prevent it from being made a cloak or artifice to distract attention from the substance of the act itself. The title, if objected to, should be aided if possible by resort to the body of the act, to show that it was not intended by such title to mislead the legislature or the people, nor distract their attention from its distinctive measures."

In harmony with this view it was held in *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786, that an act entitled "An act to secure liens to mechanics and others" was sufficiently broad to cover provisions of the act which secured liens to materialmen and contractors as well as mechanics. That decision seems directly in point. The words "and others" in that title, held to include materialmen and contractors referred to in the body of the act, is a no more liberal construction of the title than to construe "and others" to include provisions and supplies referred to in the

body of this act. In support of their argument upon this point, counsel for appellant rely particularly upon *Armour & Co. v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106, above cited. The title of the act there involved as we have noticed, contained no general words like "and others," but only the words "labor and material." That act not only provided for liens for labor and material, but also attempted to provide for securing claims by contractor's bonds. It was under the latter provision that the case was prosecuted, and failed because the subject of contractor's bonds was not included in the title. It is easy to see that the words "liens for labor and material," standing alone, do not suggest to the ordinary mind that the subject of contractor's bonds is to be legislated upon in the act. The act here involved, both in its title and body, relates only to securing claims by *contractor's bonds*, and has no reference whatever to liens. Its title we think fairly suggests all that is necessary, as to who are to be secured by such bonds in the body of the act.

We conclude that counsel's general contention that the rights of claimants under this law are confined to labor performed upon and material furnished to become a part of the finished improvement are not well founded, but that the broader language of the act may include many things which do not actually enter into and become a part of the finished structure. We will now notice the claims separately, so far as necessary, for the purpose of determining whether or not the items thereof come within the protection of the security furnished by the bond.

Respondents Wainwright & McLeod furnished to Steenstrup coal for fuel for a steam shovel, used by him in excavating, which was a necessary part of the construction of the improvement. Judgment against appellant was awarded Wainwright & McLeod upon this claim. It is insisted that this claim does not come within the protection of the security furnished by the bond, and that appellant is not liable therefor. It seems to us that this does not differ in principle

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from the furnishing of explosives for railway construction and mining work, which are held to be lienable items in the following cases: *Carson & Co. v. Shelton, supra*; *Powder Co. v. Knoxville etc. R. Co.*, 113 Tenn. 382, 83 S. W. 354, 106 Am. St. 836, 67 L. R. A. 487; *Keystone Min. Co. v. Gallagher*, 5 Colo. 23; *Giant-Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. 470; *Schaghticoke Powder Co. v. Greenwich & J. R. Co.*, 183 N. Y. 306, 76 N. E. 153, 111 Am. St. 751, 2 L. R. A. (N. S.) 288. These decisions, excepting *Carson & Co. v. Shelton*, seem to proceed, for the most part, upon the theory that explosives are included in the word "materials" as used in the statutes they deal with. It may be possible that this court could hardly follow them upon that theory and be consistent with its former holdings under our lien laws, since explosives can hardly be said to enter into and become a physical part of the finished structure as material does. We need not, however, here follow these decisions to their seeming ultimate logical result in this regard. For, since this statute allows for "provisions" and "supplies" as well as "materials," by the prescribed conditions of the bond, it seems clear that, in any event, a commodity like coal, which is consumed in generating power, is included in the word "supplies." Coal furnished and used in this manner may be said to enter into the structure very much as labor does, and it is possibly more analogous to labor than material, when used for power in this way. In any event, it seems clear to us that coal thus furnished comes within the broad provisions of this act. In the case of *Grants Pass Trust Co. v. Enterprise Mining Co., supra*, electric power was held to be a lienable item, upon the theory that it was a "supply," that being one word used in the statute providing for the lien. 37 Cyc. 607. We conclude that the judgment in favor of Wainwright & McLeod should be affirmed.

Respondent R. E. McConaghy Transfer Company furnished to Steenstrup teams with drivers for work necessary in the construction of the improvement. Judgment was rendered

in its favor upon its claims for this, against appellant. It is contended that this is not such a service or supply as comes within the protection of the bond, and that therefore appellant is not liable. In *Essency v. Essency*, 10 Wash. 375, 38 Pac. 1130, this court, considering a right of lien under a statute relating to farm laborers, said:

“One other question which will be material on the retrial is as to whether or not a lien could be maintained for the labor of the team of the respondent. The statute providing for such lien applies only to the labor of the person, and thereunder no lien will lie for work performed by the team. It is probable that where the contract is for the labor of a person and a team, for a certain rate, with no specification as to how much of it is for the team and how much for the person, a lien could be maintained for the contract price for the labor of the person and the team. But, under other circumstances, the law does not authorize a lien for the labor of the team.”

Under that decision, it would seem that, where a person was working for another with his own team, he could maintain a lien for the entire service, even though the statute seem to confine the lien to personal services only. In view of the broader provisions of this law, it seems to us it should be held to include the furnishing of services by teams and drivers thereof, even though no part of the service was personally performed by the owner of the teams so furnishing them. The manner in which this team work contributed to the improvement is not different in principle from that which was contributed to it by the furnishing of coal for the steam shovel, or by the furnishing of electric power had it been so furnished as in the Oregon case. This view finds support in the following: *Perry v. Duluth Transfer R. Co.*, 56 Minn. 306, 57 N. W. 792; *People, Use of Smith v. Collins*, 112 Mich. 605, 71 N. W. 153; *Hogan v. Cushing*, 49 Wis. 169, 5 N. W. 490; *French v. Powell*, 135 Cal. 636, 68 Pac. 92. We conclude that the judgment in favor of the transfer company should be affirmed.

Respondents John & M. C. Forrester doing business under the name of Forrester Tide Land Stables, furnished to Steenstrup teams and drivers, and in addition thereto hay and grain to feed horses used by Steenstrup upon the work. Judgment was rendered in their favor upon their claims for this, against appellant. What we have already said relative to the furnishing of teams and drivers disposes of that part of this claim. It is further contended, however, that hay and grain so furnished does not come within the protection of the bond. In the case of *Kansas City etc. R. Co. v. Graham*, 67 Kan. 791, 74 Pac. 232, it was held that corn and oats furnished to a contractor, as this hay and grain was furnished, came within the protection of a law which required a bond with conditions almost exactly like this law does, using the words "provisions and goods" instead of the words "provisions and supplies" as in this law. That case appears to be exactly like this in principle. 32 Cyc. 742. It seems to us that the words "provisions" and "supplies" includes anything that is furnished for, and used directly in the carrying on of the work, and is entirely consumed thereby. Such things do not enter into and become a physical part of the finished structure, as materials do, as that word is generally construed; but they do become as much a part of the structure as the labor which is performed upon it. It seems quite clear to us that coal, horse feed, and work performed by teams, all come within the terms of the prescribed statutory conditions of this bond, which become the measure of the rights of the several claimants. We conclude that the judgment in favor of the Tide Land Stables should be affirmed.

While the principal contention of counsel for appellant has been made upon the question of whether or not the items we have been discussing come within the protection of the bond, they have also made some contention that the evidence, as to some of the claims at least, does not warrant the conclusion that the services, provisions, and supplies involved were actually furnished for the carrying on of this work.

The evidence is not entirely satisfactory in that regard as to all of these claims; but, in view of the whole record, we conclude that we are not warranted in disturbing the conclusion of the trial court upon those questions of fact.

What has been said by us in discussing the particular claims above mentioned, disposes of all the other claims involved in the appeal, for they all belong to one or the other of the classes above discussed. We of course have not considered the claims as to which the appeal is dismissed. We are of the opinion that, as to all claims involving less than \$200 each, the appeal should be dismissed; and that as to all claims involving over \$200, the judgment of the trial court should be affirmed. It is so ordered.

DUNBAR, C. J., GOSE, CHADWICK, and CROW, JJ., concur.

[No. 10032. *En Banc*. March 26, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. A. E. COHEN,
Appellant.¹

ELECTIONS—OFFENSES — FALSE REGISTRATION — STATUTES — CONSTRUCTION. One who procures a voter to register and incorrectly state his place of residence, is not guilty of false registration, when the voter did not register in the wrong precinct, under Rem. & Bal. Code, § 4768, defining false registration as the taking of a false oath, falsely personating another and procuring registration of the person as personated, misrepresenting his name or causing any name to be registered "otherwise than in the manner provided by the act;" in view of the fact that the matter of residence is not included in the oath nor among the acts specifically enumerated as constituting the criminal offense (CHADWICK, GOSE, ELLIS, and MORRIS, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Gay, J., entered June 24, 1911, upon a trial and conviction of false registration. Reversed.

The defendant was tried and convicted upon an informa-

¹Reported in 122 Pac. 9.

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tion charging that he unlawfully counseled, encouraged, hired, induced, and procured one Adolph Schmelzer to cause his name to be placed upon the registry list of qualified voters otherwise than in the manner provided by law, viz., by stating his place of residence as 721 Sixth avenue, in Seattle, when in fact such number was not the number of his place of residence, etc.

Gill, Hoyt & Frye, for appellant.

John F. Murphy and George H. Rummens, for respondent.

PER CURIAM.—The proper disposition of this cause is governed by the decision rendered by department one on December 2, 1911, in the case of *State v. Ross*, 66 Wash. 138, 119 Pac. 20, which decision was affirmed by the court *en banc* upon petition for rehearing, this day. *Id.*, p. 141, 122 Pac. 8. The questions determinative of this case being the same as in that, the judgment of the trial court is reversed for the reasons there stated.

CHADWICK, J. (dissenting).—In my judgment this case is not controlled by the *Ross* case. I concurred there because the right of the defendant to vote was unquestioned, and to hold him guilty of a felony for giving a wrong place of residence where the intent of the law is doubtful would do violence to the spirit of the registration act. But it seems to me that the defendant in this case could not be excused under that rule. Defendant solicited a person to register, induced him to lodge at a hotel over night, and to put his name on the hotel register, asserting his residence to be his temporary lodging place. Defendant brought such person to the registration officer with intent that he should register under a false place of residence. The facts bring defendant within the last of the declaratory clauses of § 4775, "or if any person shall cause any name to be placed upon the registry list otherwise than in the manner provided in this act he shall be guilty," etc. The first clauses of § 4775 apply to the

person who registers; the last to third persons who cause or induce a false registration. A reading of the statute will confirm this construction: "If any person shall falsely swear," etc., "or shall falsely personate another," "or if any person shall represent his name . . . to be different," etc.; while the last clause is "if any person shall cause any name," etc., clearly indicating that the name of another is intended. This is the penal section of the registration act, and it will be seen the defendant may be guilty although Ross may be innocent. The form of oath as found in § 4768 indicates, also, that a party who gives the wrong age or place of residence may not be guilty under the registration law. The law nowhere requires the true residence to be stated under penalty, unless it be indirectly, as Judge Gose undertakes to show in his dissenting opinion in the *Ross* case. A party, therefore, who registers twice, once from one place and once from another, would, if he voted twice, be guilty under § 4958, Rem. & Bal. Code; while one who caused him to so act, and he alone, would be guilty under § 4775. One object of the law was to prevent the colonization of voters. There can be no doubt of the purpose of the defendant in this case to defraud the law in this respect, and I believe the conviction should stand.

GOSE, J. (dissenting)—I concur in the result reached by Judge Chadwick in his dissenting opinion, but dissent from his rule of exclusion. I have stated my view in *State v. Ross, supra*. I will only add that I think the statute which makes it penal for "any person" to cause "any name" to be placed on the registry list "otherwise than in the manner prescribed in this act" means exactly what it says.

ELLIS and MORRIS, JJ., concur with GOSE, J.

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Syllabus.

[No. 10024. Department Two. March 26, 1912.]

DEWITT CLINTON RICHARDSON, *Respondent*, v. THE CITY OF
SPOKANE, *Appellant*.¹

TRIAL—VERDICT—SPECIAL VERDICT. An answer to a special interrogatory does not require a directed verdict where it did not present the actual issue in the case.

MASTER AND SERVANT—SAFE PLACE TO WORK—NEGLIGENCE OF MASTER—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY. Where a concrete man was sent to work in a pocket formed by the wooden forms for a pier and arch, and a peavey used by carpenters' helpers upon the arch was dropped upon him, crushing his skull, whether the master was guilty of negligence in failing to furnish a safe place to work, and if so, whether the same was the proximate cause of the injury, are questions for the jury, where there was evidence from which the jury might have found that his place for work was at the bottom of a small enclosed pocket 25 feet deep, that the wooden wall for the arch formed an incline on which anything dropped would slide down into the pocket, making the place exceedingly dangerous while men were working on the arch above, that a screen or barrier could have been easily placed to catch falling objects, but none was provided, that no men were at work on the arch when the plaintiff was sent into the pocket, and no warning given that men would be placed there, and that the men sent to work on the arch out of plaintiff's sight and hearing were using heavy tools and handling timbers, and the master gave the plaintiff no notice of the changed conditions increasing the dangers of the place.

SAME—FELLOW SERVANTS—CONCURRING NEGLIGENCE. In such a case, there is no question of the negligence of a fellow servant involved, especially where there was evidence that the peavey did not fall through the negligence of the carpenter's helper, but through the vibration caused by the work on the arch; concurring negligence of a fellow servant being no defense.

DAMAGES—PERSONAL INJURIES — INSTRUCTIONS — EXPECTANCY OF LIFE. It is not error to instruct the jury on the measure of damages for personal injuries, to consider the plaintiff's "expectancy of life," following immediately a reference to his previous condition of health and earning capacity, and followed immediately by reference to the permanency of the injury, where recovery for future pain and suffering was limited to that resulting from the injury.

DAMAGES — PERSONAL INJURIES—MORTALITY TABLES—EVIDENCE—ADMISSIBILITY. In an action for permanent personal injuries, mor-

¹Reported in 122 Pac. 330.

tality tables are admissible in evidence in connection with the plaintiff's prior state of health, and the probable permanency of his injuries in determining loss of earning capacity.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$15,000 for injuries sustained by a man 26 years of age, in good health, is not excessive, where he suffered partial paralysis, has undergone two surgical operations, part of his skull was removed, he has been months in a hospital, expending \$2,000 in hospital and doctor's bills, and his injuries are permanent.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 17, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in the construction of a concrete bridge. Affirmed.

Cannon, Ferris, Swan & Lally, and A. M. Craven, for appellant.

Nuzum & Nuzum and Geo. H. Armitage, for respondent.

ELLIS, J.—This is an action to recover damages for personal injuries, suffered by the plaintiff while in the employ of the city of Spokane, in the construction of a concrete bridge across the Spokane river at Monroe street in that city. Many men were employed in the work. The carpenters and carpenters' helpers, who were constructing the wooden forms for the piers and arches of the bridge, were under one foreman. The men who mixed, poured, spread, and tamped the concrete into the forms when completed were known as concrete men, and were divided into several gangs according to their places of work. Each concrete gang was under a subforeman, and all under a head concrete foreman. The whole work was under the direction of a superintendent. The plaintiff was employed as one of the concrete men. While at work in a hole or pocket formed by parts of the wooden forms for a pier and an arch, into which place he had been ordered by his immediate foreman, a peavey, used by one of the carpenters' helpers at work upon the arch, fell upon him, crushing his skull. The negligence charged was failure to

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use reasonable care to provide and maintain a safe place of work for the plaintiff, and failure to warn him that men would be set to work upon the arch or span above him, thus rendering his place of work dangerous. At appropriate times, the defendant interposed motions for a nonsuit, for a directed verdict, and for judgment notwithstanding the verdict. These were overruled, and a judgment was entered upon the verdict of the jury for \$15,000 and costs. The defendant has appealed.

The appellant's first contention is that the trial court erred in denying the motions for a nonsuit, for a directed verdict, and for judgment notwithstanding the verdict. The argument in support of this contention is directed to an answer to the inquiry, Is a master required to anticipate the negligence of his servant and the result of that negligence to a fellow servant? Of course, the answer to the question thus broadly put would usually be in the negative. But the question does not present the actual issue on the facts before us. The real issue is better presented by the following questions: Was the master guilty of negligence in failing to use reasonable care to provide a reasonably safe place for the servant's work, and in failing to maintain it in a reasonably safe condition? If it was, then was the injury the result of that failure as the proximate cause?

That it is the positive duty of the master to exercise reasonable care to furnish a safe place of work, and that the duty is a continuing one, has so often been stated by this and other courts as to require no citation of authority. The divergence of the adjudicated cases is found, not in any real difference of opinion as to the nature or scope of the rule, but in determining what in a given case is reasonable care. That is necessarily a relative question to be determined by the nature of the work, the imminence of the danger, the consequences to be anticipated, and all the conditions, circumstances, and surroundings. These are matters resting in evidence. This, like every other question of negligence, whether

primary or contributory, is a question for the jury, whenever under the evidence the court cannot say that the minds of reasonable men may not honestly differ thereon. *Richmond v. Tacoma R. & Power Co.*, ante p. 444, 122 Pac. 351. It is not our duty to weigh the evidence, nor to pass upon its credibility. We can do neither without invading the province of the jury. We may only take the facts most favorable to the respondent, as developed by the evidence, apply the law thereto, and determine whether such facts are sufficient in law to sustain the verdict.

There was evidence from which the jury might have found the following facts: That the respondent was, at about eight o'clock in the morning, ordered by his immediate superior, the city subforeman of the particular concrete gang in which respondent was employed, to go with another man to the bottom of a hole or pocket, about twenty-five feet deep, between five and six feet long, and about two feet wide, inclosed by the wooden walls of the forms for a concrete pier and arch, and there clear out concrete which had fallen into certain drains at the base of the pier and arch; that after rising from the bottom of the hole some few feet, the wooden wall on one side passed out in a wide curve, making a part of the form for a proposed concrete arch, and forming a curving wooden incline leading directly into the pocket; that any tool or other object dropped or escaping from men at work upon this incline, whether by unavoidable accident or otherwise, would inevitably slide down it directly into and fall to the bottom of the pocket; that in the absence of a screen or barrier across the incline near where it approximated the perpendicular and formed the pocket, the bottom of the pocket, though reasonably safe at other times, was an exceedingly dangerous place in which to work while men were at work upon the arch above; that such a barrier could easily have been placed so as to avoid all danger from falling objects to those working in the pocket; that no such barrier was provided, and no one was ordered to place any protection

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over the pocket; that all of these things were patent and obvious to any one.

There was also evidence from which the jury might have found that there were no men at work upon the span or arch when the respondent and the man with him were sent into the pocket, and that they received no warning that men would be placed at work upon the arch while they were there; that the respondent at the time of the injury was loosening with a pick concrete which had fallen into the drains in the bottom of the pocket, while the other man with him was shoveling the debris into a bucket lowered from the top by a third man who would draw the bucket up with a rope; that the noise made by these two men working in this confined resonant space was such as to prevent them from hearing the men at work upon the arch above and some fifty or sixty feet distant; that the hole was so deep that they could not see the men on the arch, and that they had no knowledge that men were at work there or would be while the respondent and his companion were in the pocket. The appellant introduced evidence contradicting all or nearly all of these things, but it was for the jury to say what evidence was most credible and convincing, and which witnesses were to be believed. There was no conflict in the evidence that, about 11:30 o'clock in the forenoon of the day in question, while the defendant was on his knees loosening the concrete in the drains with a pick, a peavey escaped from one of the carpenters' helpers at work in placing forms upon the arch, slipped down the incline of the arch, fell into the pocket and, striking the respondent upon the left side of the top of the head, inflicted the injuries complained of; that the men upon the arch were using heavy tools such as peavies, adzes, hammers, iron mallets, and saws, and handling timbers.

Upon all of these facts, of which there was ample evidence which the jury might believe, we cannot say, as a matter of law, that the jury could not find the master negligent. Taking these things as true, the place of work was safe when

the respondent went to work. Conditions were changed so as to make the place extremely dangerous, by the master sending carpenters to work upon the arch. It was the master's duty to warn the respondent of the danger thus created, and take reasonable precautions for his protection, or give him a chance to protect himself. The appellant, or those placed in charge of the work by the appellant, did nothing. It failed as master to perform its whole duty to the servant. In the following cases these principles have been fully exemplified and soundly applied. They seem to us controlling upon the facts here presented: *Pennsylvania Steel Co. v. Jacobsen*, 157 Fed. 656; *Northwestern Fuel Co. v. Danielson*, 57 Fed. 915; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814; *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 96 Pac. 686; *McLeod v. Chicago, Milwaukee & St. P. R. Co.*, 65 Wash. 62, 117 Pac. 749.

It may well be doubted whether there was any such co-sociation of employment between the respondent and the carpenters as to make them fellow servants within any just application of that doctrine. There was no opportunity for that mutual observation and protection which is the logical basis of the rule. 2 Labatt, Master and Servant, § 501a.

We fail to find, however, that there is any question of fellow servant properly involved in this case. The carpenters' helper, whose peavey it was that escaped, testified that, while not using it, he stuck it between the lagging or strips in the floor of the arch; that in some way unknown to him, but he thought by reason of the vibration of the arch caused by the work being done upon it, the peavey became disengaged and slipped down the incline. His testimony tended to show that the escape of this particular tool was an unavoidable accident. The evidence was far from establishing any positive negligence on the part of this man or any other of the carpenters. However that may be, it is plain that the placing the man to work upon the arch would inevitably make respondent's place of work dangerous, though the men upon

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the arch employed the utmost care. The danger from such an escape, whatever the occasion, was so obvious, the disastrous result to the men in the pocket so inevitable and manifest, the protection against it so palpably necessary and easy to provide, that the jury were justified in finding that the failure to provide such protection or to warn of the new danger was the proximate cause of the injury. It was the cause without which the injury could not have occurred, and by which the respondent's place of work was rendered unnecessarily and inevitably dangerous when men were placed to work upon the arch. If there was any concurring negligence of a fellow servant, it would not relieve the master from liability for a failure to observe its positive duty to the respondent.

"We have frequently stated and approved the principle that the duty of the master to provide a reasonably safe place and reasonably safe appliances for his servant is personal, and, whether this duty is performed by the principal or by his agent, whoever that agent may be and in whatever capacity he may generally be employed, the duty is still that of the principal. It is also well settled that, if the negligence of a fellow servant concur with the negligence of the master, it does not excuse the primary negligence of the master for injury to another fellow servant." *Ralph v. American Bridge Co.*, 30 Wash. 500, 70 Pac. 1098.

See, also, *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; *Czarecki v. Seattle & S. F. R. & Nav. Co.*, 30 Wash. 288, 70 Pac. 750; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700. The motions were properly overruled.

It is next contended that the court erred in instructing the jury as follows:

"If you find a verdict for the plaintiff you will allow him such sum as will fairly compensate him for the injury he has sustained, and to determine its amount, you may consider plaintiff's age, his previous condition of health, his earning capacity, his expectancy of life, the permanency of the in-

jury, the pain and suffering he has endured, and which he will probably suffer from the injury in the future, and the expense he has incurred for physicians and hospital services on account of such injury."

The appellant had objected to the admission of the mortality tables in evidence, on the ground that they were made for well men, and did not form a basis of proof of expectancy in view of the plaintiff's injured condition. It is argued that this instruction was wrong, in that it permitted the jury to consider the life expectancy of the respondent as a well man, and not in his then injured condition, in determining his damages for future pain and suffering. There would be merit in this contention had the claim for damages been based upon present and future pain and suffering alone; but such was not the case. The claim was for loss of earning capacity as well as for pain and suffering. The phrase "his expectancy of life" in the instruction, following immediately the reference to his previous condition of health and his earning capacity, and followed immediately by the reference to permanency of injury, was obviously intended to be considered with reference to those things. The reference to the pain and suffering which he had endured and probably would endure in the future was in plain terms limited to that resulting "from the injury," and was just as obviously intended to be considered with reference to his injured condition and the nature and extent of the injuries, whether permanent or otherwise, and not with reference to his prior state of health or his life expectancy based thereon. If we indulge the degree of criticism invited by the appellant, we might with equal reason say that the reference to permanent injury precluded recovery for future suffering in case the injury was not permanent. Neither of these strained constructions is warranted. It will be assumed that the jurors were men of ordinary intelligence. As such they could not have been misled by the language used into a belief that respondent's future pain and suffering, plainly referred to as a result of the injured condition

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alone, had any reference to his prior state of health or to his life expectancy based thereon. That the mortality tables were admissible as evidence to be considered by the jury in connection with the evidence as to the respondent's prior state of health, and the probable permanency of his injury in determining damages by loss of earning capacity, is the established law in this state. *Brown v. Blaine*, 41 Wash. 287, 83 Pac. 310; *Hodd v. Tacoma*, 45 Wash. 436, 88 Pac. 842; *Duskey v. Green Lake Shingle Co.*, 51 Wash. 145, 98 Pac. 99; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4. In the last case cited, the subject is thoroughly discussed, with the following conclusion:

"But notwithstanding these differences, the practice of admitting standard mortality tables in evidence whenever it becomes necessary to estimate the value of annuities, dower, curtesy, or damages for wrongful act, has become too well established to admit of question, and the application of the rule governing their admission does not depend on race or color, time or place. Of course the tables are not binding on the jury."

See, also, *Illinois Cent. R. Co. v. Houchins*, 121 Ky. 526, 89 S. W. 530, 123 Am. St. 205, 1 L. R. A. (N. S.) 375; *Northern Texas Const. Co. v. Crawford*, 39 Tex. Civ. App. 56, 87 S. W. 223; *Haynes v. Waterville & O. St. R. Co.*, 101 Me. 335, 64 Atl. 614; *Belmer v. Boyne City Tanning Co.*, 160 Mich. 669, 125 N. W. 726; *Louisville, N. A. & C. R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; 13 Cyc. p. 198; 7 Ency. Evidence, pp. 425, 426; 8 Ency. Evidence, p. 634. We find no error in the admission of the mortality tables, nor in the instruction as given by the court.

Finally, it is claimed that the verdict is excessive. The respondent was, at the time of the injury, a young man about twenty-six years of age, in good health, and capable of earning three dollars a day, with a life expectancy of about thirty-eight years. The injury has incapacitated him for work of any kind. His right arm and right leg are partially para-

lyzed, his power of speech is impaired, there is a partial paralysis of the right side of his face, and there is a space of about two and one-half inches in diameter in the top of his head from which the skull has been entirely removed. He has undergone two surgical operations, and has spent months in a hospital. His hospital bills and doctor's bills up to the time of the trial amounted to nearly \$2,000. There can be no question that his injuries are permanent. While the verdict is for a large sum, we cannot say, in view of the respondent's pitiable condition, that it is more than compensatory. It is not such as to indicate that the jury was influenced by passion, prejudice, or other improper motive. The trial court, who heard the evidence and observed the man's condition, did not reduce the verdict, and we do not feel warranted in doing so.

The cause was submitted to the jury on competent evidence and under proper instructions. We find no error which would justify a reversal. The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and MORRIS, JJ., concur.

[No. 10093. Department One. March 26, 1912.]

AIMEE L. NORMAN, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — OBJECTIONS — WAIVER — ACTION TO SET ASIDE. Objections going to the regularity of an assessment for a local improvement are cured by confirmation of the assessment roll, in the absence of appeal therefrom, and cannot be made the basis for an action to set aside the assessment.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 22, 1911, upon findings in favor of the defendant, in an action to set aside an assessment for a local improvement. Affirmed.

¹Reported in 122 Pac. 330.

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Opinion Per Curiam.

T. D. Rockwell, F. M. Dudley, Joseph T. Rosslow, and Cullen, Lee & Foster, for appellant.

A. M. Craven and John E. Orr, for respondent.

PER CURIAM.—Action by summons and complaint to cancel and set aside a local assessment for street improvement. Judgment for the defendant. The plaintiff has appealed.

The assessment was made and regularly confirmed in 1904. The appellant filed objections to the confirmation of the assessment, but did not appeal. The facts relied upon for reversal may be summarized as follows: That the assessment exceeds fifty per cent of the assessed value of the property; that the improvement was not petitioned for by the owners of three-fourths of the property to be assessed for the proposed improvement; that the report of the board of public works to the city council did not comply with the requirements of § 62 of the city charter, and that it did not comply with the ordinances of the city in this: (1) that it did not correctly report the assessed valuation of the property which in the judgment of the board should be assessed for the improvement; (2) that it did not report the estimated cost of the improvement; and (3) that it contained no recommendations for the improvement.

The charter, §§ 61 and 62, imposes no limitation upon the power of the council to make improvements, and put the burden upon the property benefited other than the implied one that the assessment shall not exceed the benefits. The objections go to the regularity of the proceedings and not to their validity. The irregularities pointed out were cured by the confirmation of the assessment roll by the city council. The appellant's remedy was by an appeal from the order of confirmation. Failing to pursue this remedy, her rights are concluded by that order. This case is controlled in every respect by the recent case of *Rucker Brothers v. Everett*, 66 Wash. 366, 119 Pac. 807, where the jurisdictional ques-

tion is fully discussed. We are satisfied with the rule announced in that case.

The judgment is affirmed.

[No. 9999. Department One. March 26, 1912.]

HENRY KOENIG, *Respondent*, v. WHATCOM FALLS MILL
COMPANY *et al.*, *Appellants*.¹

BOUNDARIES—SURVEYS—LOST CORNERS—LOCATION OF LINE—EVIDENCE—SUFFICIENCY. Plaintiff's evidence, that he, not being a surveyor, established a disputed center line of a section by measuring forty chains east of the southwest corner of the section, is insufficient to sustain a verdict finding that to be the true location of the line, where the true quarter corner was established in accordance with the rules for relocating lost corners on a straight line between and equidistant from the section corners, by an experienced and disinterested surveyor, who made an accurate survey and found the south line of the section to exceed one mile by 528 feet.

NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE—ABUSE OF DISCRETION. It is an abuse of discretion to refuse a new trial for insufficiency of the evidence to sustain the verdict where the evidence as a whole is insufficient, although there is some slight evidence, which, standing alone, might sustain the verdict.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 29, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass. Reversed.

Hadley, Hadley & Abbott and *Cooley & Horan*, for appellants.

E. C. Dailey, for respondent.

PARKER, J.—This is an action to recover damages for the cutting and removal of timber which is claimed to be the property of the plaintiff. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff, from which the defendants have appealed. Among other

¹Reported in 122 Pac. 16.

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Opinion Per PARKER, J.

errors assigned, is the denial by the trial court of appellants' motion for a new trial, made upon the ground of insufficiency of the evidence to sustain the verdict. In view of our conclusions upon the questions presented by this assignment, we deem it unnecessary to notice other contentions of counsel.

Appellant Whatcom Falls Mill Company is the owner of the east half of the southwest $\frac{1}{4}$ of section 22, township 31 north, range 6, east, W. M., in Snohomish county. Appellant Matson, at the time of the alleged trespass, was employed by the mill company in charge of its logging operations upon this land. Respondent is the owner of the west half of the southeast quarter of the same section. This results in the north and south center line of the section being the common boundary between the two tracts of land. Respondent claims that in logging operations conducted by appellants upon the land of the mill company, they cut and removed the timber from a strip of his land 478 feet wide, lying immediately east of and along the boundary line between the two tracts. Appellants concede that they inadvertently cut and removed timber from a strip of respondent's land about 85 feet wide, lying immediately east of and along the true boundary line between the two tracts; but deny that they cut timber from or trespassed upon respondent's land to any greater extent. It is clear from the record before us that the jury concluded that the boundary line between the two tracts was proven to be the line claimed as such by respondent, and that appellants trespassed upon his land substantially to the extent claimed by him. It is also clear that the jury measured respondent's damage accordingly. If the evidence is sufficient to support the conclusion of the jury as to the location of the boundary line, it was not error for the trial court to deny appellants a new trial; but if the evidence is insufficient to support such conclusion, then a new trial should have been granted to appellants.

There is practically no conflict in the evidence upon the

question of the true location of the north and south center line of the section, that being the line in dispute, in so far as the truth of the statements made by the several witnesses in their testimony is concerned. The question is to be decided by the comparative probative force of the facts testified to, rather than by the comparative credibility of the witnesses. We may for present purposes proceed upon the theory that respondent and his witness testified truthfully as to the facts upon which he rests his claimed location of the line.

This land was surveyed by the government in the year 1879. About the year 1889, respondent acquired the west one-half of the southeast quarter of the section from the government. At that time, and at all times since then, the original quarter corner on the south line of the section, which was established by the government surveyor upon the ground, if any such corner was ever so established, has been lost. This is conceded by all parties. The original section corners at the southwest and southeast corners of the section, as established by the government surveyor upon the ground, are both still in existence. This fact is not in dispute. The government survey field notes, which were introduced in evidence, show that the government surveyor first ran east forty chains from the southwest corner of the section, and set a temporary quarter corner at that point; that he then ran on east to the southeast corner of the section making the south line of the section 79.90 chains long; that he then ran back upon the line 39.95 chains and set the permanent quarter corner at that point. So the field notes indicate that the quarter corner was set at its proper location; that is, equidistant between the section corners.

Soon after respondent acquired his land from the government, he attempted to locate his west boundary line, which of course would be the line running north from the south quarter corner through the center of the section, by measur-

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ing forty chains east from the southwest corner of the section. He also claims to have measured twenty chains west from a point which he had been told by others was his southeast corner. He never measured from any other points to determine his west boundary. Being unable to find upon the ground any indications of a quarter corner having been there established by the government surveyor, he concluded that the point he thus determined by his measurements was the correct location of that quarter corner. He then marked a line north from that point through the woods by blazing trees. This is the line he now claims to be the west boundary of his land. He is not a surveyor, though we may assume, for the sake of argument, that his measure of forty chains east from the southwest corner of the section was approximately correct. This of course would be the correct distance from that corner to the quarter corner if the south section corners were exactly twice that distance apart. Considerable reliance is placed upon the fact that the field notes indicate the setting of a quarter corner forty chains east of the southwest corner of the section. We have seen, however, that that was only fixed as a temporary quarter corner, and even if the field notes controlled in cases where the quarter corner is lost, the force of that location would be overcome by the fact that the field notes further show that the permanent quarter corner was established 39.95 chains measured west from the southeast corner of the section. Respondent admits that he never measured from that corner. This is the substance of all the evidence, worthy of serious consideration, in support of respondent's contention that the true boundary is located where he claims it to be.

After the controversy arose between respondent and appellants as to the correct boundary line between their tracts of land, appellants employed A. R. Campbell, a civil engineer of Bellingham, to resurvey this section and locate the south quarter corner and the true boundary line between the tracts.

Mr. Campbell was then a surveyor and engineer of twenty-two years' experience, he had been county surveyor of Whatcom county for four years, had been city engineer for some time, and was experienced in government survey work. His qualifications in this regard are not questioned and there is nothing in the record reflecting upon his veracity. From his testimony it appears that he established the south quarter corner of the section, and the line running north therefrom dividing the section into halves, strictly in accordance with the well-established rules governing the restoration of lost corners and subdividing sections; one of which rules is, that lost quarter corners are to be relocated on a straight line between section corners and equidistant therefrom. 5 Cyc. 874; *Heybrook v. Index Lumber Co.*, 49 Wash. 378, 95 Pac. 324.

This is not only the law, but the trial court in substance so instructed the jury. Mr. Campbell found by his survey, which was apparently conducted with great care, that the south line of the section is 528.6 feet more than a mile long. This resulted in the equidistant point, at which he relocated the quarter corner, being a considerable distance east of where it was claimed to be by respondent. This survey, if correct, is all but conclusive of the fact that appellants have encroached upon respondent's land only about eighty-five feet. There is no question here of agreed location of boundary, nor of adverse possession. The problem of the true location of the boundary line is practically one of surveying only. It is worthy of note that we have in this record the undisputed evidence of at least two experienced persons, one of whom is Mr. Campbell, that the varying of the length of section lines to a considerable extent, as in this case, is not unusual, and that a section is seldom found which is correct.

We have, then, in support of respondent's contention, his attempted relocation of this south quarter corner, for the purpose of ascertaining his west boundary, by a method of

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measurement which is not recognized in law as a correct method; though we may concede that the location of that corner by him at a point forty chains east of the southwest corner of the section is some slight evidence of that being its correct location, because that is where it is theoretically presumed to be. That presumption, however, cannot stand against a location established by an accurate survey which ascertains the equidistant point between the section corners to be at another place on the line. Every word of respondent's testimony and the witnesses supporting him might be true, and yet his claimed location of this quarter corner be erroneous. Were we determining the question as between two surveys, fixing the equidistant point between the section corners as the quarter corner, at different places, we, of course, would not, under ordinary circumstances, interfere with the finding of a jury as to which is correct. But in view of the fact that respondent never attempted to find the equidistant point between the two known section corners, and in view of the results of the survey made by Mr. Campbell, we cannot escape the conclusion that the evidence does not sustain the verdict of the jury. Under the law as established in this state, it sometimes becomes the duty of the court to grant a new trial because of the insufficiency of evidence to sustain the verdict, even though there is some slight evidence, which, if standing alone, might sustain the verdict. When it can be seen from the whole evidence, as in this case, that there is such a want of sufficient evidence to sustain the verdict, we think the trial court can be said to have abused its discretion in denying a motion for new trial. The following decisions indicate the views of this court in a general way upon this subject though none of them involve a case just like this. *Pederson v. Seattle Consol. St. R. Co.*, 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132; *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 Pac. 738; *Welever v. Advance Shingle Co.*,

34 Wash. 331, 75 Pac. 863; *Wait v. Robertson Mortgage Co.*, 37 Wash. 282, 79 Pac. 926.

The judgment is reversed and appellants granted a new trial.

CROW and GOSE, JJ., concur.

CHADWICK, J., concurs in the result.

[No. 9898. Department One. March 26, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. HENRIETTA
SOMERVILLE, *Appellant*.¹

CONSTITUTIONAL LAW—POLICE POWER—HOURS OF SERVICES—REASONABLENESS—EVIDENCE—ADMISSIBILITY. Under Laws of 1911, p. 131, providing that no female shall be employed eight hours during any day in any mechanical or mercantile establishment, laundry, hotel, or restaurant, except in harvesting, packing, curing or canning perishable fruit, vegetables or fish, the unconstitutionality of the act as an arbitrary and unwarranted exercise of the police power cannot be shown by evidence that defendant's factory was sanitary and healthful, the labor of female employees light and harmless, and that they could be employed for nine hours a day without endangering or impairing their health or physical condition; since the courts can look only to the law itself and scientific facts of which it can take judicial notice.

CONSTITUTIONAL LAW—DUE PROCESS—RIGHT TO CONTRACT—FEMALE LABOR—EIGHT-HOUR DAY. Laws of 1911, p. 131, providing that no female shall be employed more than eight hours during any day in any mechanical or mercantile establishment, laundry, hotel, or restaurant, except in harvesting, packing, curing or canning perishable fruit, vegetables or fish, is not unconstitutional as depriving employers and employees in the enumerated callings of their right to contract without due process of law; all doubts being resolved in favor of the validity of the law.

SAME—CLASS LEGISLATION—EQUAL PROTECTION OF THE LAWS. Such act does not violate the constitutional prohibitions against class legislation or deprivation of equal protection of the laws by reason of the exceptions enumerated in the proviso; the classification being within the discretion of the legislature and founded on a reasonable basis.

¹Reported in 122 Pac. 324.

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Appeal from a judgment of the superior court for King county, Main, J., entered September 9, 1911, upon a trial and conviction of employing a woman in violation of the eight hour day law. Affirmed.

Trefethen & Grinstead, for appellant.

John F. Murphy, Hugh M. Caldwell, Herbert B. Butler, and Reah M. Whitehead, for respondent.

CROW, J.—The defendant Henrietta Somerville was arrested, tried, convicted, and fined under an information filed by the prosecuting attorney of King county, which omitting formal parts charged as follows:

“She, the said Henrietta Somerville, in the county of King, state of Washington, on the 9th day of June, 1911, being then and there the superintendent of R. S. Somerville and H. K. Somerville, copartners, then and there doing business under the name and style of the ‘Washington Paper Box Company,’ which said R. S. Somerville and H. K. Somerville, as copartners as aforesaid, then and there owned, conducted and operated under said name ‘Washington Paper Box Company,’ a certain mechanical and mercantile establishment for the making and selling of paper boxes, did then and there wilfully and unlawfully employ a female, namely, one Mattie Garse, in said establishment more than eight hours, to wit, for a period of nine hours during said day.”

From such conviction and the final judgment entered thereon, the defendant has appealed.

Appellant contends that the statute under which she was prosecuted, chapter 37, p. 131, Laws 1911, is unconstitutional. Section 1 of the act reads as follows:

“No female shall be employed in any mechanical or mercantile establishment, laundry, hotel or restaurant in this state more than eight hours during any day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four: *Provided, however,* That the provisions of this section in relation to the hours of employment shall not apply to, nor affect, females employed

in harvesting, packing, curing, canning, or drying any variety of perishable fruit or vegetable, nor to females employed in canning fish or shellfish. . . .”

By stipulation, a jury was waived; and upon trial to the court, it was conceded that the statute if valid had been violated by appellant. For the purpose, however, of showing that the action of the legislature in enacting the law, and in attempting to exercise the police power of the state was unreasonable and arbitrary, and that a maximum limit of eight hours cannot be sustained, appellant introduced evidence which was admitted by the trial judge to aid her in making a record for this court. The evidence thus introduced tended to show that appellant's factory was modern, well-equipped, sanitary and healthful; that the labor performed by the female employees was light and harmless; that they could be thus employed for nine hours per day without endangering or impairing their health or physical condition, and that no sufficient reason existed for a limitation of their labor to eight hours per day. The state introduced no evidence to rebut this showing, its contention then and now being that the evidence was immaterial and irrelevant.

In passing upon the constitutionality of a statute, courts cannot be controlled by evidence of this character. Assuming, without deciding, that the undisputed evidence thus admitted supports appellant's contention as to her factory, and as to all other factories of a like character in this state, with reference to their equipment, sanitary condition, and the labor required of female employees, it might be that in another prosecution for the employment of females in a like factory, less convincing evidence would be produced, or that the state by its evidence might successfully refute the alleged facts upon which appellant relies in this action. Yet it is manifest that a court could not in one prosecution declare the act unconstitutional while sustaining it in the other. Evidence upon which appellant thus relies to sustain her present contention that the statute is an unreasonable,

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arbitrary and unwarranted exercise of the police power, might with propriety have been presented to the legislature when it had the act under consideration, but it cannot be controlling or conclusive on the courts when presented as a defense in a criminal prosecution under a statute the constitutionality of which is assailed. Courts in passing upon the reasonableness or unreasonableness of a statute, and deciding whether the legislature has exceeded its powers to such an extent as to render the act invalid, must look at the terms of the act itself, and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge and of which they can take judicial notice.

Appellant contends that the statute is in contravention of sections 8 and 12, of article 1, of the state constitution, and the fourteenth amendment to the constitution of the United States, in that without due process of law, it deprives employers and employees in the enumerated factories and callings of their right to contract relative to the employees' labor. Labor is property as to which employer and employee may contract. To arbitrarily deprive either of such right to contract would be a violation of the Federal and state constitutions, and when the legislature attempts to restrict such right, the duty devolves upon the courts to determine whether the restrictions are within constitutional limitations. Statutes regulating and restricting hours of labor, and the right of private individuals to contract therefor, when valid are sustained as a proper exercise of the police power, and many courts have held that a large discretion is necessarily vested in the legislature when exercising that power, and that the legislature may determine not only what the public interest demands, but also what measures are requisite and necessary to secure and protect the same. Referring to limitations imposed by a state upon the hours of workmen and their right to contract therefor, the supreme court of the

United States, in *Holden v. Hardy*, 169 U. S. 366, 391, said:

"This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases *Davidson v. New Orleans*, 96 U. S. 97, and *Yick Wo v. Hopkins*, 118 U. S. 356, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Lawton v. Steele*, 152 U. S. 133, 136."

We have before us, then, the question whether in this particular act the legislature has so far exceeded the necessary and reasonable exercise of the police power, in fixing the maximum daily labor at eight hours, as to render the act invalid. Any legislative enactment must be regarded as valid unless it unquestionably and palpably violates some right secured by fundamental law. All doubts as to its validity must be resolved in favor of the statute. Courts are not concerned with questions of the propriety, advisability or wisdom of any statute. Those questions are for the exclusive consideration of the legislature. Legislative functions are not to be usurped by the courts. After we have given the statute a careful consideration in all of its bearings, if we are not clearly convinced that it is unconstitutional, we should resolve all doubts in its favor and sustain it.

The courts have not agreed at all times as to what are reasonable restrictions upon the right of private individuals to

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contract for hours of labor, but the later decisions have evinced marked liberality in sustaining legislation of this character. The police power which may be invoked to protect the health, property, welfare, and morals of citizens is an inherent attribute of sovereignty, the exercise of which is necessary to secure good government and promote the public welfare. Circumstances and occasions calling for its exercise have multiplied with marvelous rapidity in recent years, by reason of the well-recognized fact that modern, social and economic conditions have called into existence agencies previously unknown; many of which so vitally affect the health and physical condition of laborers, and especially female laborers, that legislation of the character here involved has been sustained with greater liberality than was formerly evinced under less exacting conditions. In *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 92 Am. St. 930, 59 L. R. A. 342, this court sustained, as a legitimate exercise of the police power, an act limiting the employment of females in any mechanical or mercantile establishment, or any laundry, hotel, or restaurant, to ten hours per day. The supreme court of the United States in *Lockner v. New York*, 198 U. S. 45, by a bare majority of the judges, held there was no reasonable ground on the score of health for interfering with the liberty of the person, or the right of free contract, by determining the hours of labor in the occupation of a baker, and that a statute limiting such labor to sixty hours per week or ten hours per day was invalid. In the later case of *Muller v. Oregon*, 208 U. S. 412, the same court unanimously sustained the validity of an act in relation to the hours of labor for women in mechanical establishments, factories, or laundries, limiting the same to ten hours per day. In that case, Mr. Justice Brewer said:

“We held in *Lockner v. New York*, 198 U. S. 45, that a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the

police power of the state, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the Federal constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor. . . . While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation: *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383; *Wenham v. State*, 65 Neb. 394, 400, 406; *State v. Buchanan*, 29 Wash. 602; *Commonwealth v. Beatty*, 15 Pa. Sup. Ct. 5, 17; against them is the case of *Ritchie v. People*, 155 Ill. 98. . . . Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge. It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the fourteenth amendment to the Federal constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the fourteenth amendment, restrict in many respects the individual's power of contract. Without stopping to discuss at length the extent to which a state may act in this respect, we refer to the following cases in which the question has been considered: *Allgeyer v. Louisiana*, 165 U. S. 578; *Holden v. Hardy*, 169 U. S. 366; *Lockner v. New York*, 198 U. S. 45. That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when

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they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race. Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her

from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."

We have thus quoted at length from the opinion of the learned justice because we think his argument is convincing and unanswerable, and that it supports the validity of the statute now under consideration. While there are other distinctions, we think the only material difference between the statute sustained in *Muller v. Oregon, supra*, and the one now under consideration, is that in the former the maximum limit was ten hours, while in the latter it is eight hours. Yet we cannot say that the limitation of eight hours is so unreasonable or arbitrary as to invalidate the statute. The question of the limitation to be fixed was one resting within the discretion of the legislature. It is common knowledge that a large portion of the working time for labor in this country is by private contract fixed at eight hours per day. It must be presumed that, after careful consideration and inquiry, the legislature concluded that a maximum of eight hours was a reasonable and proper limitation to place upon the work of female laborers in the factories and employments mentioned in the statute, and we are unable to conclude that the limitation thus fixed is unreasonable and arbitrary. Resolving as we must all doubts in favor of the act, we conclude it must be sustained.

Appellant, calling attention to the proviso of the first section of the act, further contends that it violates section 12

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of article 1 of the state constitution and the fourteenth amendment of the Federal constitution. The proviso excepts from the operation of the act females employed in harvesting, packing, curing, canning, or drying any variety of perishable fruit or vegetable, and females employed in canning fish or shell fish. Appellant insists that this proviso makes the act arbitrary in its application, and that if the legislature intended to protect female employees in the interest of their health and the public welfare, it could not be permitted to make an exception of these occupations, which appellant contends are especially strenuous and equally injurious. Appellant also questions the motives of the legislature in making these exceptions. We cannot consider their motives. With them we have no concern. The only question before us is whether the classifications made by the statute are reasonable and valid. We think they are. In *State v. McFarland*, 60 Wash. 98, 110 Pac. 792, 140 Am. St. 909, this court said:

“If any such classification can be sustained, it rests entirely within the discretion of the legislature to determine and establish its basis, and its determination when expressed in statutory enactment cannot be questioned successfully, unless it is so manifestly arbitrary, unreasonable, inequitable, and unjust that it will cause an imposition of burdens upon one class to the exclusion of another without reasonable distinction. The legislature, within the limitations of an exercise of a reasonable discretion, is required to base its classification upon some practical consideration suggested by necessity. Any class created by legislative enactment and subjected to the operation of the law must be such as to embrace all persons or corporations in like circumstances or situation. The classification must be practical, reasonable and certain, not factitious, arbitrary, or unjust. To be constitutional it must be predicated upon such a substantial distinction as suggests needed legislation relative to one class as distinguished from another.”

See, also, *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504.

It is common knowledge that the particular callings ex-

cluded by the statute now before us must be pursued at certain seasons of the year, and then for brief periods only. Fruits and vegetables that are perishable must be harvested, packed, cured, canned, or dried at the proper seasons. Likewise fish and shell fish can only be taken and canned at certain seasons; whereas in mechanical or mercantile establishments, laundries, hotels, and restaurants, females are employed throughout the entire year. Extra or longer hours of daily labor during a brief season might not have the same tendency to impair health or physical condition. It is manifest that clear, practical, and reasonable distinctions exist as a basis for the classifications created, and that the legislature for good and sufficient reasons in the exercise of its discretion made the exceptions contained in the proviso. This objection to the statute cannot be sustained. 8 Cyc. 1051. *In re Martin*, 157 Cal. 51, 106 Pac. 235, 26 L. R. A. (N. S.) 242; *Wenham v. State*, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825; *Mt. Vernon etc. Co. v. Frankfort etc. Ins. Co.*, 111 Md. 561, 75 Atl. 105, 134 Am. St. 636.

We find no sufficient reason for declaring the act unconstitutional. The judgment is affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

CHADWICK, J. (concurring).—The proof in this case shows, without contradiction, that the factory conducted by the defendant is clean and wholesome, and is in no way a menace to the health of the employees; and if a correct solution of this particular case depended upon the evidence alone, the act could hardly be sustained. But admitting that the legislature cannot pass a law which arbitrarily and unreasonably impairs the right of contract, it does not follow that courts are at liberty to disregard the legislative will, unless the facts and conditions upon which it bases its judgment are so well understood that they can take judicial notice or knowledge of them. In other words, where the facts depend upon proof, I think it is competent for the legislature to pass

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a labor law covering any particular industry, and that the law will be binding upon the courts regardless of the showing that might be made in any particular case. If it were otherwise, we would have a law for "special cases," and we could not depend upon general laws, for the obvious reason that the legislature could not pass a law with any assurance that it would be general in its application.

I have not found the rule to be stated in any of the books exactly as I have stated it, but the difficulty of applying any other rule may be illustrated. For instance, the supreme court of the United States, as well as many of the state courts, has held a law limiting the number of hours an underground miner can work to be constitutional; while the supreme court of Colorado held directly to the contrary. On the other hand, the supreme court of Nebraska has held that, although a law limiting the hours of labor as to men will not be sustained unless health and safety require it, most any kind of a law will be sustained as to women because of her sex and dependent relation. Although varying in statement, this distinction runs through the cases. We find it in the decisions of the supreme court of the United States. *Lockner v. New York, supra*, is an example of the one view, and *Muller v. Oregon, supra*, cited in Judge Crow's opinion, is a type of the other. Authorities almost without number might be referred to. But it is not cases, but the principle to which I would refer, and until the supreme court of the United States decides otherwise, I am willing to hold—for I believe it is the only consistent thing for a court to do—that in all cases pertaining to the police power, the legislature is supreme unless the general application of the law does violence to the common knowledge of men, in which event a court might properly intervene. If there can be a difference of opinion, the judgment of the legislative body must prevail.

I regret that my associates have deemed it necessary to uphold the exception to the law in so far as it relates to

women employed in fruit and vegetable canneries. I have grave doubt as to the validity of this exception. The exception, in so far as it applies to women employed in fish canning establishments, is upon surer ground, and would probably be sustained upon a direct attack. It was unnecessary to hold the exception, or any part of the exception, good in this case, for the defendant can have no interest beyond the body of the law. I am mindful of the legislative direction: "If it shall be adjudicated that the foregoing proviso and exception shall be unconstitutional and invalid for any reason, an adjudication of invalidity of said proviso or any part thereof shall not affect the validity of the act as a whole, nor any part thereof." Under the ordinary rule of interpretation, as we have heretofore understood and applied it, such direction would not be held to influence the court in any way; the rule being that, if the exception were declared invalid, as appellant contends it is, the whole act would be avoided, under the theory that the legislature would not have passed the act without the exception. Yet I see no objection to the legislature changing this rule of interpretation, and saying in terms to the courts that it was its intention to pass a law limiting hours of labor for women, and that it has made the act broad enough to include the excepted class, and if the courts upon consideration of the law find the exception to be without sustaining reason, the whole law shall not be declared bad because of uncertainty as to legislative intent, but the exception shall be regarded as if it had not been written. Although contrary to precedent and practice, the idea seems to me to be a wholesome one, and a right well within the power of the legislature. Granting this power to the legislature, I believe that the exception of women employed in fruit and vegetable canning establishments cannot be sustained, and that they can work eight hours and no more. For the exception, in so far as it refers to them, is based, not upon the health, safety, or welfare of the women employees, but upon the necessities of the employer; that is

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to say, if he is engaged in putting up perishable stuff and might lose money by putting on more employees or working them more than the prescribed number of hours, he can violate the law at will. Laws like the one under review are passed and sustained on the theory that they better the condition of human beings. The exception makes the condition (perishability) of the fruit or vegetable the test, rather than the health, welfare, or safety of the employee. The exception is unreasonable and should not have our approval.

I know of no case, and I think none will be found, which would approve the application of the rule of police power in such a case. I concur in the holding of my associates that defendant is within the law, but I would not have sustained the exception in the particular noted. I would hold the law to be general in its application, except in so far as women employed in fish packing establishments are concerned.

[No. 9907. Department One. March 27, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN KING,
Appellant.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in excluding evidence is cured where the fact was established by other evidence.

WITNESSES—CROSS-EXAMINATION—CRIMINAL LAW. Where the accused offered himself as a witness and testified that he had been looking for work and could not find it, it is not error to allow cross-examination showing that he had not had a steady job for some time before the commission of the crime.

ROBBERY—IDENTITY OF ACCUSED—POSSESSION OF STOLEN PROPERTY—EVIDENCE—SUFFICIENCY. A conviction of robbery is sustained where part of the property taken was found in defendant's possession, and he was taken shortly after the robbery in the vicinity where the crime was committed, although there was no direct evidence of identity.

¹Reported in 122 Pac. 323.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 5, 1911, upon a trial and conviction of robbery. Affirmed.

E. C. Dailey, for appellant.

Ralph C. Bell, for respondent.

CHADWICK, J.—Appellant was convicted of the crime of robbery, and brings his case here, assigning that the court erred in sustaining an objection to a certain question asked of one of the state's witnesses when under cross-examination. The answer might well have been allowed but, inasmuch as the fact sought to be elucidated was brought out by the testimony of the appellant and other witnesses, the ruling, admitting for the sake of argument that it was error, was without prejudice.

It is also complained that the court permitted the prosecuting attorney to question defendant as to his antecedents and whereabouts for some time prior to the trial. This is said to be prejudicial, because it disclosed the fact to the jury that appellant did not and had not had a steady job for some time. When appellant offered himself as a witness, he subjected himself to all rules governing the examination of other witnesses. Under any view of the law, we cannot assume that the jury was prejudiced by the examination. Appellant swore that he had been looking for work but had not found it. We would prefer to assume that his condition invited the sympathy rather than the ill-will of the jury.

Finally, it is contended that the evidence does not sustain the verdict. Certain property taken from the prosecuting witness was found in appellant's possession. A short time after the robbery, appellant with five others was arrested. While the prisoners were being taken to jail, one escaped. Appellant argues that:

“Under the circumstances of the arrest of six men, one escaping on the way to the station, leaving five taken and all

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of these taken together, it would be an easy matter for one to slip a tobacco sack into the pocket of defendant. It is possible defendant was one who committed the crime, that is he could have been one, but it takes conjecture and suspicion to convict him. Possession of some of the property taken is not proof of the robbery or that defendant had a hand in the commission of the crime itself, or knowledge of it. . . . The gist of the crime is the unlawful assault and force and violence used upon the person of the complaining witness and mere proof of the possession of some of the property is not sufficient to prove guilt beyond all reasonable doubt."

Articles of property, taken by means of robbery and found recently thereafter in the possession of the defendant, are admissible in evidence. Ency. Evidence, § 472. And such possession is a circumstance to be considered by the jury. 34 Cyc. 1808. The testimony in this case is not entirely satisfactory, in that the identity of the appellant is not established by direct evidence. But, taken as a whole, the recent possession of stolen property, the fact that appellant was taken shortly after the robbery and in the vicinity where the crime was committed, was sufficient to take the case to the jury. The case of *State v. Wyatt*, 124 Mo. 537, 27 S. W. 1096, is in point. A conviction was there sustained, where, as we read the case, there was no direct evidence of identity.

Judgment affirmed.

DUNBAR, C. J., CROW, and GOSE, JJ., concur.

[No. 9970. Department One. March 27, 1912.]

C. A. TOWNSEND *et al.*, *Respondents*, v. THREE LAKES
LUMBER COMPANY, *Appellant*.¹

PARTIES—BRINGING IN NEW PARTIES—PLEADINGS—AMENDMENTS. In an action for trespass by the cutting of timber, it is not error to allow a trial amendment to the complaint, bringing in as plaintiffs the plaintiff's father and mother, after the testimony showed that the legal title to the land was in the son and that the parents had some legal or equitable interest therein, the issues not being changed and the defendants not claiming any surprise.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 8, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass. Affirmed.

Cooley & Horan and *R. Mulvihill*, for appellant.

Coleman, Fogarty & Anderson, for respondents.

PARKER, J.—This action was commenced by the plaintiff C. A. Townsend against the defendant to recover damages for the alleged unlawful cutting and removal of timber from his land. During the progress of the trial, the other plaintiffs were brought into the case. The verdict was in favor of the plaintiffs, which also included a finding, in substance, that the trespass was willful on the part of the defendant. Judgment was rendered accordingly against the defendant for treble the amount of actual damages found by the jury, as provided by Rem. & Bal. Code, § 939.

The principal contention of counsel for appellant is directed against the sufficiency of the evidence to sustain the verdict. This only involves questions of conflict of evidence and the credibility of witnesses. A reading of the entire evidence convinces us that we would not be warranted in inter-

¹Reported in 122 Pac. 29.

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fering with the judgment upon this ground. We deem it unnecessary to review the evidence in detail in this opinion.

It is also contended that the trial court erred in permitting the complaint to be amended during the progress of the trial by joining L. D. Townsend and wife as plaintiffs with C. A. Townsend; and also erred in denying appellant's motion for a continuance made at the same time. At the beginning of the trial, it was admitted by counsel for appellant that C. A. Townsend, the original plaintiff, was the owner of the land at the time of the removal of the timber therefrom by appellant, as alleged in the original complaint. It developed from the testimony of C. A. Townsend, on his cross-examination by counsel for appellant, that L. D. Townsend and wife were the father and mother of C. A. Townsend, and had some interest in the land and timber. Whether their interest was legal or equitable does not clearly appear. But it is a fair inference from the testimony that the legal title was in C. A. Townsend, and that he had an understanding with his parents that they were to be regarded as having each a one-third interest. After this appeared in the evidence, counsel for respondent asked leave to amend the complaint, with the result above noticed. It is plain from the record that the bringing in of the new plaintiffs did not change the issues involved in the least. Counsel for appellant did not claim surprise, and made no showing whatever in support of their motion for continuance. Indeed, that they were not surprised at the fact that the parents had an interest of some nature in the land and timber, is shown by the fact that appellant received a notice before the removal of the timber from the land protesting against such removal, signed by the parents as well as by C. A. Townsend. This of course was long before the admission of ownership made by appellant's counsel at the beginning of the trial. We are of the opinion that the court acted well within its discretionary powers in making these rulings. Rem. & Bal.

Code, § 303; *Hulbert v. Brackett*, 8 Wash. 438, 36 Pac. 264; *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, GOSE, and CROW, JJ., concur.

[No. 9998. Department One. March 27, 1912.]

JAMES BARRON, *Respondent*, v. R. E. ROBINSON *et al.*,
Appellants.¹

BILLS AND NOTES—PAYMENT — CONTRACTS — FOR SECURITY — CONSTRUCTION—ACCEPTING MORTGAGE. Where an agreement between the makers and the payee of a note for \$3,500, provided that out of \$11,500 to be received from the sale of a steamer (upon which the payee held a chattel mortgage for \$10,000) the payee should pay certain claims, applying the balance on his mortgage, and that the payee was entitled to hold the \$3,500 until he had received his full claim (the makers acknowledging their liability thereon, less an agreed credit, to the amount of the payee's loss in the transaction, if any, up to the amount of said note less the credit, upon the sale of the steamer to the payee of the note, who received but \$1,000 and took a chattel mortgage for \$10,500 for the balance, upon which the purchaser of the steamer defaulted) the \$3,500 was not paid by the transaction but was held as security for the payee's losses; since the payee did not accept the mortgage as cash.

SAME. Such losses of the payee included money paid for attorneys' and court fees in resisting claims upon the advice of counsel and insurance on the steamer stipulated for in the mortgage.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered July 12, 1911, upon findings in favor of the plaintiff, in an action upon a promissory note, after a trial to the court. Affirmed.

Merrick & Mills and Padgett & Bell, for appellants.

J. A. Coleman, for respondent.

GOSE, J.—Suit upon a promissory note. Judgment for the plaintiff. The defendants have appealed.

¹Reported in 122 Pac. 343.

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Opinion Per Gose, J.

Briefly stated, the case presented by the record is this: The Everett Navigation Company, a corporation of which the appellants were officers and trustees, on October 16, 1909, owned two boats, named the Howard D. and the Columbia. The respondent held a mortgage upon the former for \$1,500, and upon the latter for \$10,000. At the same time, the respondent held the note of the corporation for \$3,500, which had been indorsed by the appellants before delivery. The purpose of this suit is to recover the balance due upon the last named note. The appellants pleaded payment. The burden was upon them to establish it. Upon the date stated, the navigation company sold the Howard D. for \$4,200, and caused the purchase price to be paid to the respondent. On the same day it passed the following resolution:

“James Good having made an offer of eleven thousand five hundred dollars (\$11,500), for the steamer ‘Columbia’ and the scow, with all machinery, equipment, etc., including an assignment of the company and of James Barron in the contract with the Northwestern Iron Works and the Everett Navigation Company for an engine, and after considerable discussion it was moved and seconded that the offer be accepted, that the secretary and president be instructed to sign a bill of sale of the steamer ‘Columbia’ and scow, the purchase price of eleven thousand five hundred dollars (\$11,500) to be paid by the said James Good to James Barron to be applied by him in payment of his mortgage and claims against the steamer ‘Columbia’; the sum of three hundred dollars (\$300) and interest to be paid to the First National Bank in payment of their claims against the said scow.”

At the same time and as a part of the transaction, the appellants and one H. A. Douglas who was then the secretary of the navigation company, entered into the following agreement with the respondent:

“Know all men by these presents: That we, R. E. Robinson, E. Reid, R. M. Westover and H. A. Douglass, hereby agree with James Barron, as follows:

“That the said James Barron, out of the sum of eleven thousand five hundred dollars (\$11,500) to be received from

the sale of the steamer 'Columbia' from James Good, do pay all liabilities which are a charge on the said boat in priority to his mortgage, and to pay the claim of the First National Bank for three hundred dollars (\$300) on the scow, and the balance to be applied on his mortgage, and it is understood and agreed that the said James Barron is entitled to retain the note for three thousand five hundred dollars (\$3,500) he holds made by the Everett Navigation Company to him and endorsed by us, less the sum of seven hundred seventy-five dollars (\$775) as credited on same (until all the claims have been adjusted), and in case a receiver to the said company should be appointed, and a sale of the said boat and scow to James Good should be set aside, and the said James Barron should not receive the full amount of his claims, we, as endorsers of the said note, hereby admit our liability on said note for the said sum of \$3,500, less the sum of \$775 now credited on said note.

"It is understood and agreed that in making up the claim of the said James Barron on said mortgage and note that he agrees to make a reduction from ten thousand dollars (\$10,000) on his mortgage to eight thousand five hundred dollars (\$8,500) and to charge interest on that sum only. In determining whether or not he has received his full claim, we waive all protest of the note for \$3,500 and agree that we are individually liable under the same to the amount of James Barron's loss in this transaction, if any, up to the amount of the said note of \$3,500 less the said sum of \$775 credited thereon.

"We each covenant and agree with James Barron that we will pay the note for two thousand dollars (\$2,000) made by the Everett Navigation Company to the First National Bank and endorsed by ourselves, and save James Barron and James Good harmless from any claims brought on said note."

In pursuance of the resolution, the navigation company conveyed the boat to James Good by a bill of sale. Good paid the respondent \$1,000, and executed a mortgage to him for \$10,500, the balance of the purchase price.

The appellants' principal contention is, if we understand their position, that the steamer was sold to the respondent; that he caused it to be conveyed to Good; that he accepted the mortgage from Good for \$10,500 as cash; that he

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agreed to pay the lienable claims against the boat, and that the appellants were only to be held upon the note upon the happening of one or both of two contingencies: (1) If the indebtedness of the navigation company to the respondent, plus the amount paid by him on lienable claims existing against the boat on the date of the agreement, exceeded the amount of the Good mortgage (upon the happening of this event, they admit their liability upon the note for such excess); and (2) in event a receiver should be appointed, and the sale to Good should be held invalid so as to prevent the respondent from receiving the "full amount of his claims."

Whilst the written documents are not happily phrased, we cannot agree with that interpretation. The resolution shows that the navigation company made the sale direct to Good, and that he was to pay the purchase price to the respondent to be "applied by him in payment of his mortgage and claims against the steamer Columbia." The claims referred to are the lienable claims provided for in the contract. The contract proper discloses that the \$3,500 note was to be held by the respondent as security for the purposes and to the extent following: (1) "Until all the claims have been adjusted," meaning paid; (2) in event the full payment of respondent's "claims" should be defeated by the appointment of a receiver and the vacation of the sale of the steamer to Good; and (3) for "the amount of James Barron's [respondent's] loss in the transaction." In other words, the appellants were to be held liable upon the note in suit, less the credit of \$775, to the extent of all loss sustained by the respondent, whether arising from the failure of the purchaser to pay the purchase price or arising from the payment of the lien claims. Stated more concretely, the respondent did not agree to accept the Good mortgage as cash. Good defaulted upon the mortgage, and it was foreclosed by the respondent and purchased by him at the mortgage sale.

The appellants' next contention is that the court erro-

neously credited the respondent with certain sums paid by him in the discharge of liens upon the boat. The particular items attacked are, (1) money expended in the payment of counsel and court fees in resisting the foreclosure of certain liens; (2) money paid for insurance upon the steamer; and (3) the balance paid upon an engine which was installed in the steamer after the sale to Good. The oral testimony shows that the liens were resisted upon the advice of counsel, and that the insurance premium was paid for the purpose of keeping the steamer insured in accordance with a stipulation in the mortgage. These items were properly allowed.

The court charged the respondent with the price paid for the steamer at the foreclosure sale. The appellants contend that he should have been charged with the amount of the Good mortgage. This contention has already been disposed of.

We need not consider the engine item, for if disallowed the balance due the respondent was in excess of the judgment. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, CROW, and PARKER, JJ., concur.

[No. 9942. Department One. March 27, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.

WILLIAM HORNADAY, *Appellant*.¹

CRIMINAL LAW—TRIAL—REOPENING CASE. It is within the discretion of the trial court in a criminal case to reopen the case to allow the state to introduce further evidence.

INCEST—ACCOMPLICE—EVIDENCE—SUFFICIENCY. A conviction for incest may be had upon the uncorroborated evidence of an accomplice.

INCEST—ACCOMPLICE. The female is not an accomplice in incest, where she at no time consented to the criminal relations.

¹Reported in 122 Pac. 822.

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Opinion Per CROW, J.

INCEST—CONSENT. One may be guilty of incest although the act was accomplished without consent.

CRIMINAL LAW—APPEAL—REVIEW—OBJECTIONS. Error cannot be predicated upon failure to require the state to elect between the acts charged, where no request for an election was made below.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 14, 1910, upon a trial and conviction of incest. Affirmed.

J. Matthew Murray (*Walter M. Harvey*, of counsel), for appellant.

J. L. McMurray and *A. O. Burmeister*, for respondent.

CROW, J.—The defendant, William Hornaday, was convicted of the crime of incest, and has appealed.

The evidence, which was sufficient to sustain the verdict, will not be discussed. When the state first rested its case, appellant moved for a directed verdict of acquittal, for the want of proof that the prosecuting witness was his daughter. We find there was evidence of that fact. Before the motion was decided by the trial judge, the prosecuting attorney was granted leave to reopen the case and introduce further evidence of such relationship. Appellant now insists this was reversible error. We cannot sustain this contention. The privilege granted the state was within the sound discretion of the trial judge, and no abuse of discretion has been shown.

Appellant contends that the evidence of the prosecuting witness, if accepted, discloses the fact that she was his accomplice, and that the trial judge erred in failing to instruct the jury that he could not be convicted upon her uncorroborated evidence. The court instructed as follows:

“If you find from the evidence beyond a reasonable doubt that the prosecutrix, Grace Hornaday, was the daughter of the defendant, and if you further find beyond a reasonable doubt that the defendant did have sexual intercourse with her at any time within three years prior to the filing of the information herein, and you further find that her credibility

has not been successfully impeached, and you believe her testimony and disbelieve the defendant, you have a right to return a verdict of guilty against the defendant, even though there is no corroborative evidence as to any specific act of intercourse between them.

"You are further instructed that if you believe from the evidence that the crime charged against the defendant rests alone upon the testimony of the prosecuting witness, Grace Hornaday, then you should scrutinize her testimony with care and caution."

These instructions were as favorable as appellant could ask. In *State v. Aker*, 54 Wash. 342, 103 Pac. 420, an incest case, this court held that corroboration of the prosecuting witness was not necessary. Appellant, however, insists that, according to the statements of the prosecuting witness, she was his accomplice, and that not only should the jury have been cautioned to carefully weigh her evidence, but they should also have been warned against a conviction upon her uncorroborated statement. Her evidence shows that she was not his accomplice, but the unwilling victim of his lust, that she was within his power, and that she at no time consented to criminal relations with him. Mr. Wharton, in his work on Criminal Evidence (9th ed.), at § 440, says:

"An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime. The cooperation in the crime must be real, not merely apparent. Hence, although a woman who voluntarily is guilty of incest, or who cooperates voluntarily and deliberately with others to produce an abortion on herself, is an accomplice, it is otherwise when she is the victim of force, fraud, or undue influence."

See, also, *Whittaker v. Commonwealth*, 95 Ky. 632, 27 S. W. 83; *State v. Kouhns*, 103 Iowa 720, 73 N. W. 353; *State v. Rennick*, 127 Iowa 294, 103 N. W. 159; *State v. Goodsell*, 138 Iowa 504, 116 N. W. 605; *Schwartz v. State*, 65 Neb. 196, 91 N. W. 190.

In *State v. Rennick*, *supra*, the court said:

"It is claimed by counsel that the defendant could not

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be rightfully convicted upon the uncorroborated testimony of the daughter, and that the jury should have been so instructed. There is no statutory requirement which makes corroboration necessary in such cases. The only direct evidence as to the circumstances of the alleged crime is found in the testimony of the daughter, who testifies unequivocally that the connection was accomplished by force and against her will. There is an entire absence of testimony from which the jury could have found any consent on her part. She was therefore not an accomplice, whose evidence must be corroborated to support a conviction."

That appellant could be guilty of incest, although the act of intercourse was accomplished without the consent of the prosecuting witness, has been held by this court. *State v. Nugent*, 20 Wash. 522, 56 Pac. 25, 72 Am. St. 133.

It is contended that the trial judge erred in failing to require the state to elect the particular act of intercourse upon which it would rely for conviction. This question is not before us. No request for an election was made by appellant, nor was it mentioned during the progress of the trial.

Other contentions based upon the admissibility of evidence are without merit. The appellant has been awarded a fair trial, free from prejudicial error. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, GOSE, and PARKER, JJ., concur.

[No. 9522. Department Two. March 28, 1912.]

MAUD I. HETRICK, *Respondent*, v. CHARLES WESLEY SMITH,
Appellant, MAUD I. HETRICK, INCORPORATED, *et al.*,
Respondents.¹

ATTORNEY AND CLIENT—DUTIES—CONVERSION—BY TRUSTEE—EVIDENCE—SUFFICIENCY. An attorney holding stock in a corporation as a trustee for his client and to indemnify him upon his indorsement of a note, is guilty of a conversion thereof, where he transferred part of his stock to a business associate, called a meeting of the stockholders, ousted his client from office, organized a new corporation, and transferred to it all the assets of the old corporation by voting the stock; his acts being construed most strongly against him, and the burden being upon him to show that his dealings were free from all reasonable grounds of suspicion.

TROVER AND CONVERSION—DAMAGES—CORPORATE STOCK—VALUE—EVIDENCE—ADMISSIBILITY. Upon a conversion of all the stock of a private corporation, which had no regular market value, its value may be proven by showing the value of the property and business of the corporation at the date of the conversion over and above its liabilities, to be determined by the value of the stock on hand, rather than the book value of the stock.

SAME. In such a case, the accounts receivable should be figured at their face value, where the defendant wrongfully converting the stock notified plaintiff not to make any attempt to collect the accounts.

SAME—DAMAGES—EVIDENCE. In an action for conversion of corporate stock, where the plaintiff offered no evidence of the value of the property of the corporation, the value may be assumed from an inventory of the merchandise on hand near the date of the conversion, where two witnesses testified to its correctness and the actual value.

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—EVIDENCE—SUFFICIENCY. In an action by a wife for conversion of stock held in trust for her by defendant, the stock is sufficiently shown to be separate property where she so testified, and all of the dealings of the trustee had been with her individually.

Appeal from a judgment of the superior court for King county, Carey, J., entered October 28, 1910, upon findings

¹Reported in 122 Pac. 363.

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in favor of the plaintiff against one of the defendants, in an action for an accounting. Modified.

McClure & McClure and *J. A. Stratton*, for appellant.

Josiah Thomas, for respondent Hetrick.

ELLIS, J.—This action was brought by Maud I. Hetrick against Charles Wesley Smith, Maud I. Hetrick, Incorporated, Minnie C. Ward, Mary B. Jones, and Ward & Jones, a corporation, for an accounting for the value of the capital stock of the corporation, Maud I. Hetrick, Incorporated, which it is claimed the defendant Smith held in trust for the plaintiff and converted to his own use about June 1st, 1909. It is claimed that by this conversion he wrongfully secured full control of the corporation and full possession of all of its assets, and on August 12, 1909, sold the same to the defendants Ward & Jones, a corporation, the stock of which last named corporation was owned, one-half by the defendant Smith, and one-fourth each by the defendants Ward and Jones. The cause was tried to the court without a jury. The court made findings in favor of the plaintiff and entered judgment against the defendant Smith for \$1,400 and costs, dismissing the action as to the other defendants. From that judgment, the defendant Smith has appealed.

The court found that the defendant Smith, an attorney in active practice of his profession in the city of Seattle, was employed by the plaintiff as her attorney and counsellor about February 4, 1909; that prior to that time the plaintiff had been in the retail millinery business in Seattle, and so continued up to February 12, 1909, and at that time owned a stock of millinery goods and fixtures of a reasonable value of \$1,100; that she explained to the defendant Smith all matters in connection with her millinery business, and he advised her to incorporate; that she explained to him that she did not have cash to spend in incorporating, and was putting proceeds of sales back into the business, purchasing more goods; that Smith told her he would borrow for her

from the National Bank of Commerce, of Seattle, \$200, and at his suggestion she signed a note to the bank for \$200, which Smith endorsed; that, on or about February 12, 1909, the millinery business was incorporated as Maud I. Hetrick, Incorporated, with a capital stock of \$1,000 in 100 shares, of a par value of \$10 each; that the \$200 proceeds of the note was deposited to the credit of the corporation; that the plaintiff turned over all of her goods and fixtures to the corporation in full payment of the entire capital stock; that only one share of the stock was issued to the plaintiff, and the other ninety-nine shares were issued to the defendant Smith in trust for the plaintiff, and to indemnify Smith against his endorsement of the note, and also to protect him in his compensation for his services; that the plaintiff was a trustee, vice president, secretary and manager, and the defendant Smith was a trustee, president and treasurer of the corporation; that it was agreed that all moneys coming into the hands of the corporation were to be accounted for to the defendant Smith, and by him deposited in the National Bank of Commerce, and checked out by him as treasurer as necessary in conducting the business of the corporation; that he was to act as treasurer until he was relieved from any liability on account of his indorsement of the plaintiff's note and compensated in full for his services as attorney for plaintiff and the corporation; that on his being released from any obligation on the \$200 note and being paid for his services, the ninety-nine shares of stock were to be returned to the plaintiff, and that the plaintiff was to receive a salary of \$200 per month for her services as manager of the corporation. The court further found that the defendant Smith, on or about May 31, 1909, while acting as attorney and legal adviser for the plaintiff, wrongfully and unlawfully converted the ninety-nine shares of the capital stock of the corporation which he held in trust for plaintiff, as well as its business, goods, fixtures and earnings, to his own use; that the value of these shares and of the one share held by plaintiff, as

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shown by the books of the corporation at the time of the conversion, after paying all of the obligations and debts of the corporation, including the compensation of the defendant Smith, and deducting all moneys withdrawn by the plaintiff, was the sum of \$1,400; that the \$200 note of the plaintiff, endorsed by the defendant Smith, had been paid out of funds belonging to the corporation prior to May 31, 1909, and the defendant Smith had been released from all liability by reason of his endorsement; that the capital stock of the corporation, Maud I. Hetrick, Incorporated, was owned by the plaintiff as her separate property. These findings were all excepted to by the defendant Smith, and the errors assigned are mainly directed against them as being contrary to the evidence.

We have examined the voluminous evidence with much care, but a discussion of it in detail would be a useless task. We are satisfied that the court's findings, save one, are sustained by a preponderance of the evidence. There are but three questions raised by the assignments of error that we deem it necessary to discuss.

(1) The finding that the appellant, on May 31, 1909, converted the 99 shares of capital stock to his own use, is assigned as error. It must be borne in mind that the relation of the parties was that of attorney and client, trustee, and *cestui que trust*. The only interest appellant had in the stock was as security against his endorsement of the respondent's note for \$200 and for his compensation as her legal adviser. The parties were not dealing at arm's length. That the respondent trusted him implicitly is shown by the fact that she placed in his name practically all of the capital stock which she herself had paid for with what the evidence shows was all the property she owned. She had thus placed her property interests unreservedly in his hands. In such a case, the acts of the attorney and trustee must be viewed most narrowly and his conduct construed most strongly against him. The burden was upon him to show that his dealing

with the subject of the trust was free from all reasonable grounds for suspicion. She was entitled to full knowledge of his every act touching the trust, and to be taken into his fullest confidence and consulted as to any proposed disposition of the stock and the management of the corporate business which the stock represented. 4 Cyc. 957, 958, 960; *Felton v. Le Breton*, 92 Cal. 457, 28 Pac. 490; *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496; *Rogers v. Marshall*, 14 Central Law Journal, 168; *Kisling v. Shaw*, 33 Cal. 425, 91 Am. Dec. 644; *Williams v. Reed*, 3 Mason (U. S.) 405; *Cunningham v. Jones*, 37 Kan. 477, 15 Pac. 572, 1 Am. St. 257; *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 100.

The evidence shows that, on about May 4th, the appellant turned over to his business associate, a Mr. Kelley, without the respondent's knowledge or consent, five shares of this stock without consideration, and for the obvious purpose of qualifying him to act as a trustee of the corporation. On May 31st, without notifying the respondent of his intentions or divulging the purpose of the meeting, he called a meeting of the stockholders for June 1st. The respondent advised him that she could not be present at that meeting and requested a postponement until the next day. She testified that she assumed that her request would be complied with. The meeting, however, was held on June 1st, and the respondent, by voting the stock which he held in trust, ousted her as trustee, vice president, secretary and manager of the corporation, and assumed possession of its books and accounts and absolute control of its assets. On June 4, he wrote to her as follows:

"Mrs. Maud I. Hetrick,

"1809 18th Ave., Seattle.

"Dear Madam,—You are hereby informed that any evidence of an attempt on your part, or the part of anyone acting for you or under your instructions, to collect or sequester the accounts and bills receivable of this company, of which you were formerly the manager, will be used as a basis for criminal prosecution by this company. As you are well

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aware, no person has authority to collect or disburse the funds of the company, or endorse any paper payable to it, except its treasurer, and you will be advised and act accordingly.

Yours respectfully

“(Seal)

Maud I. Hetrick, Inc.

“C. W. Smith, President & Treasurer.

“L. J. Cruttenden, Secretary.”

If further evidence were necessary to show that his intention was to treat the stock as his absolute property, and ignore the trust relation in which he held it, that evidence was found in the fact that on August 12, 1909, he organized the corporation of Ward & Jones, taking half of the capital stock in his own name, and transferred to it all of the assets of Maud I. Hetrick, Incorporated, by voting the stock of that corporation. The finding of the court as to the time of the conversion was fully justified by the evidence.

(2) It is contended that the court erred in finding that the stock converted was at the time of the conversion of a value of \$1,400, and further erred in entering judgment for that amount. The conversion being established, the respondent was entitled to recover the value of the stock at the time of the conversion, regardless of what the property of the company may have been subsequently transferred for by the appellant. *Cushman v. Bonfield*, 139 Ill. 219, 28 N. E. 937; *Darling v. Potts*, 118 Mo. 506, 24 S. W. 461; *McDonald v. Danahy*, 196 Ill. 133, 63 N. E. 648. Where the stock has a regular market value, there is little difficulty in applying this rule. In this instance, however, the stock had no known market value. None of it was ever listed for sale or sold. In such a case value may be proven by showing the value of the property and business of the corporation at the date of the conversion less the liabilities at that time.

“Great difficulty has been experienced in determining what shall be the measure of damages for the conversion of stock. As the manner and conditions of the conversion vary, so also will the measure of damages vary from nominal damages to the highest value of the stock with dividends and interest,

and also any special damages which the plaintiff can establish. In general, the courts incline to the rule that the true measure of damages is the value of stock at the time of conversion, or a reasonable time after. By the phrase 'the value of the stock' is usually to be understood the market value. The fact that the shares of stock have no known market value will not prevent recovery, where the actual value is ascertainable, in an action to recover damages. The value may be proven by showing the value of the property and business of the corporation, less the amount of the liabilities." 2 Cook, Corporations (6th ed.), § 581.

See, also, *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012; *McDonald v. Danahy*, *supra*.

From rulings of the court during the progress of the trial, it is apparent that this rule was adopted, and from the amount found and a consideration of the evidence it would seem that the court found the value of \$1,400 by taking what appeared to be approximately the book value of the stock arrived at as follows:

Assets.

Accounts receivable on May 31, 1909.....	\$1,220.32
Cash on hand May 31, 1909.....	86.78
Furniture and fixtures.....	500.00
Moneys withdrawn by plaintiff.....	1,113.78
Inventory estimated from original inventory, purchases and sales.....	1,500.00
	<hr/>
	\$4,420.88

Liabilities.

Notes payable to bank.....	\$1,000.00
Accounts payable	163.00
Capital stock at par.....	1,000.00
Due defendant Smith.....	647.71
Bank overdraft	7.95
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	\$2,818.66

Apparent surplus	\$1,602.22
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Deducting from this apparent surplus the money that had been withdrawn by the respondent, there would be left an actual surplus of \$488.44, this added to the paid-up capital stock would make the stock worth on May 1, 1909, \$1,488.44. This would clearly be the actual value if the book value of the assets be taken as their actual worth. The rule, however, in its just operation contemplates a value of the assets to be determined as nearly as may be by the actual worth of the stock on hand. *Cabble v. Cabble*, 111 App. Div. 426, 97 N. Y. Supp. 778.

As to the accounts receivable the appellant, having converted the stock and notified the respondent not to attempt any collection of the accounts, should be charged with them at their face. There is, however, in evidence an actual inventory of the merchandise on hand made by the defendants Miss Ward and Miss Jones on June 8, 1909, both of whom testified to its correctness as showing the actual goods present and their actual value. It fixes the value at \$1,062.21. This seems to be conceded by the appellant as the actual value of the merchandise on hand at that time. Since the respondent offered no evidence of actual value, we think the court should have taken this inventory as showing the goods and their value. It was made near the date of the conversion, and there was no evidence of any material change in the stock of goods between the date of the conversion and the date of this inventory.

There is another item which should also be revised. According to the evidence of the accountant and the showing on the ledger of the company, it appeared that the respondent had withdrawn money to the amount of \$1,689.54 instead of \$1,113.78. The preponderance of evidence sustains the larger amount. The statement of the assets should therefore be revised as follows:

Accounts receivable	\$1,220.32
Cash	86.78
Fixtures	500.00

Money withdrawn by respondent.....	\$1,689.54
Merchandise as per inventory.....	1,062.21
	<hr/>
Total assets	\$4,558.85
Liabilities	\$2,818.66
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Apparent surplus	\$1,740.19
Deducting money withdrawn by respondent.....	\$1,689.54
	<hr/>
Leaves a real surplus of.....	\$50.65

Adding this to the face value of the stock, we have the actual value at time of conversion, \$1,050.65. From the vast mass of figures, statements and books submitted for our investigation in the statement of facts, this is as near as we have been able to arrive at any reasonable conclusion. We are satisfied that it is not far wrong. The judgment should have been for the last mentioned amount, and costs.

(3) It is objected that there was not a sufficient showing that the stock was the separate property of the respondent to enable her to maintain this action without joining her husband as plaintiff. She testified that the property was her separate property. Whatever claim the appellant had upon this stock was based upon his dealings with her alone. He took it from her and in trust for her. He is in no position to question her right to recover it or its value.

The cause is remanded with directions to modify the judgment in accordance with this opinion. Appellant may recover his costs on this appeal.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

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Opinion Per PARKER, J.

[No. 10044. Department One. March 28, 1912.]

ALASKA BANKING & SAFE DEPOSIT COMPANY, *Respondent*, v.
D. W. SIMMONS *et al.*, *Appellants*.¹

PARTNERSHIP—WITHDRAWAL OF MEMBER—EVIDENCE—SUFFICIENCY. The evidence fails to show that a member had withdrawn from a partnership before the execution of a note to a bank, where there was evidence that he was introduced to the bank as interested in the firm and indorsed prior notes for the firm, subsequent to the alleged withdrawal, that subsequently he agreed to give his services to the firm for one year free, or furnish a man in his place, and the firm paid no rent for a building of his which it occupied, and the other partner denied that he ever ceased to be a member.

HUSBAND AND WIFE—COMMUNITY DEBT—ACTIONS—JUDGMENT—FORM. In an action against a husband on a promissory note in which the wife was joined with a view of establishing the debt as their community debt, a judgment against the husband alone reciting that it is enforceable out of the separate and community property of the husband is not a judgment against the wife's community interest, or against the community.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 4, 1911, upon findings in favor of the plaintiff, in an action upon a promissory note, after a trial to the court. Affirmed.

C. H. Winders, for appellants.

Bogle, Merritt & Bogle, for respondent.

PARKER, J.—This is an action to recover a balance due upon a promissory note, executed and delivered to the plaintiff, Alaska Banking & Safe Deposit Company, on September 5, 1907, by Irvine, Leslie & Co., a partnership, which the plaintiff alleges consisted of Richard Irvine, R. G. Leslie, and D. W. Simmons, at the time of the execution of the note. Nellie E. Simmons, the wife of D. W. Simmons, was made a defendant with a view to establishing the debt evidenced by the note as a community debt of Simmons and wife, as well

¹Reported in 122 Pac. 319.

as a separate debt of the members of the partnership. A trial before the court without a jury resulted in findings and judgment against the partnership and its members, including D. W. Simmons, for the balance due upon the note, enforceable out of the separate and community property of D. W. Simmons. Simmons and wife have appealed. The rights of the other defendants are not here involved.

The contentions of Simmons and wife are, in substance, that the trial court erred in holding (1) that Simmons was a member of the partnership at the time of the execution of the note, and (2) in adjudging that the judgment should be enforceable out of the separate and community property of D. W. Simmons. The trial court decided against Simmons upon the question of his being a member of the partnership at the time of the execution of the note, upon the ground that he was then such member in fact; and also upon the ground that he was estopped from denying that fact by reason of his act and representations inducing respondent to so believe. Findings of fact were made by the court amply supporting both of these grounds of its decision. The contentions of counsel for appellant upon this branch of the case involve almost wholly questions of fact. We will first notice the facts with a view to ascertaining whether or not the evidence warrants the conclusion that Simmons was a partner in fact. We may find that he was such, and thereby be relieved from noticing the question of estoppel.

The respondent is a banking corporation, maintaining a bank at Nome, Alaska. From the spring of 1903 until the fall of 1908, the firm of Irvine, Leslie & Company was engaged in the general merchandising business under that name, at Council City, in Alaska, which is about one hundred miles from Nome. During this period, the firm was a customer of respondent bank, both as a depositor and borrower. The firm was first organized, and a formal written copartnership agreement entered into the provisions of which, so far as we need notice them, are as follows:

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"Council City, Alaska, April 1st, 1903.

"Memorandum of agreement made and entered into by and between R. Irvine, R. G. Leslie and D. W. Simmons, all of Council City, Alaska, by which the said parties agree to enter into a partnership for the purpose of conducting a general merchandise business in Council City, Alaska.

"The terms of said partnership shall exist for one year from date of agreement, unless mutually dissolved at an earlier date. The parties named herein agree to furnish sufficient capital as it may require to carry on said business, each individual shall furnish a like sum.

"The parties agree to carry on said business in the Simmons building situated between the Hub Saloon and the U. S. Marshall's office, said building being the property of D. W. Simmons party herein, and same shall be used free of rent, it being understood and agreed, that said D. W. Simmons contributes said building free of charge to himself and partners, and they agree to give their services without remuneration, in the management of said business. . . .

"R. Irvine,

"D. W. Simmons,

"R. G. Leslie."

Each of the partners, including Simmons, then paid into the capital stock of the firm \$1,000, which is all that was ever actually contributed in money towards the capital of the firm by any of its members. In the fall of 1903, Simmons left Council City, intending to spend the winter in Seattle and elsewhere and return the following spring or summer. The partners realizing that he probably could not get back to Council City until after April 1st 1904, which would be the end of the partnership period according to the written agreement, it was agreed between the partners that the partnership should continue until his return. He returned to Council City about July 1st, 1904. He claims that soon thereafter the partnership was dissolved by mutual consent. He testifies that he could not then get his money out without crippling the business, and it was agreed between them that he should not take his money out until they suspended business, or for a period of time in any event. There is no more

definite testimony than this as to how much he was to receive for his interest in the business, or as to when he should receive it, and it is conceded that he never received anything for his interest. He further testifies that it was then understood that the other partners were to have the continued use of his building for \$50 per month. He admits, however, that none of this rent was ever paid to him. Irvine in his testimony denies that Simmons ever ceased to be a partner in the business. The testimony of other witnesses is conflicting upon this question. Their testimony consists largely of statements of mere conclusion, and is to a considerable extent hearsay. Such is the unsatisfactory condition of the evidence bearing directly upon the question of Simmons withdrawing from the partnership. Subsequent events, however, we think throw a great deal of light upon this question. In noticing these events, it will be well to keep in mind that all of the evidence which tends to show Simmons' withdrawal from the partnership tends to show that such withdrawal occurred in the summer of 1904. It is not claimed to have occurred later than that, nor at any other time. Irvine testifies that Simmons "assisted in the business during the summers 1905 and 1906." In 1905 Simmons signed a paper reading as follows:

"Council City, Oct. 7th, 1905.

"I, the undersigned, D. W. Simmons, a member of the firm of Irvine, Leslie & Company, do hereby agree to give my services free from June 1st, 1906, to Oct. 1st, 1906, or pay a man to take my place. D. W. Simmons."

There is no direct evidence explaining the occasion of the signing of this paper, but its purpose was evidently to show some understanding between him and the other partners, and in any event seems to be a plain admission that he was then a partner. In the fall of 1906 the firm had become indebted to the National Grocery Company in a considerable sum. Simmons then went to Nome, where he met a Mr. Dunbar, a representative of that company. They then talked over

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the conditions and prospects of the firm in connection with this indebtedness, and also the possibility of the firm procuring a loan from respondent bank. Simmons being not very well acquainted with the officers of the bank, and Dunbar being well acquainted with them, having had large business dealings with them, he agreed to speak to the bank officers in behalf of the firm with a view to the firm procuring a loan. Soon thereafter Simmons and Dunbar went to the bank together with a view to securing a loan for the firm of \$7,000. Mr. Thatcher, the manager of the bank, testified as to what occurred on that occasion as follows:

"In the fall of 1906 Mr. Simmons came into our bank at Nome with Mr. Dunbar of the National Company, and requested a loan of \$7,000. Mr. Dunbar made the preliminary statement. I do not think I had ever met Mr. Simmons before. I knew of him. I believe Dr. Whitehead of our bank was acquainted with him. Mr. Dunbar introduced him and said that he was interested with Irvine, Leslie & Co., at Council, Alaska, and that they wanted to borrow some money, the bulk of which was to go to his concern, the National Grocery Company. He said that Mr. Simmons owned some property around North Yakima of some considerable value; that is, his individual responsibility outside of the assets of the firm. Mr. Simmons assented to all this. Dr. Whitehead and myself—it was in the presence of all of us—asked him if he would personally endorse the note. He said 'Yes.' The note was made out before, however, asked Mr. Simmons the condition of the firm of Irvine, Leslie & Company and he outlined it, stated about what they owe, about what their stock on hand was, and when they expected to collect money in and be able to pay this note. When it came to signing the note, I says Mr. Irvine has always signed checks for this company and we better have some permission on this, etc. We called up Council,—I recollect it was in our bank; at least the answer came to our bank, and I asked Richard Irvine, whether Mr. Simmons was authorized to sign and to make this note, etc., and he said 'yes,' so that completed the loan as far as getting the money for the first \$7,000. That was paid off from time to time, as the receipts of the

mercantile business came in. In the early spring up there, along about June, of 1907."

There is but little dispute as to these facts, except Simmons denies that he gave any detailed information to the bank as to the stock and finances of the firm. It seems to us that a fair inference to be drawn as to what occurred at the bank at that time, is that Simmons then admitted he was a partner in the firm. Thereafter, in the fall of 1907, Simmons again came out to Seattle and later endorsed a note for \$10,000 signed by the firm and given to the National Grocery Company. So at that time Simmons had become obligated by endorsements upon the notes of the firm for \$17,000. On September 5, 1907, the loan evidenced by the note sued upon in this action was made by respondent bank to the firm. At that time Simmons was not in Alaska. This loan was made to the firm at the solicitation of Irvine, who signed the firm name thereto. The relationship existing between Simmons and the other partners was apparently only of a business nature. They were not blood relations, and had been acquainted but a comparatively short time before entering into partnership. Simmons insists that what he did for the firm after 1904, of the nature we have above noticed, was prompted by his desire to see the firm successful and by the fact that it was using his building; though he admits that at no time after the alleged dissolution of the partnership in 1904 did he ever receive any rent for the use of the building.

It is beyond dispute that Simmons became a member of the partnership at the time it was originally formed in 1903. It seems equally clear that he continued to be such partner for at least some considerable time thereafter. The general rule applicable to such a condition is, that a partnership is presumed to continue until that presumption is overcome by evidence tending to show a dissolution. 30 Cyc. 418. In view of the conflict in the evidence relating directly to the alleged withdrawal of Simmons from the partnership in 1904,

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and the subsequent events pointing to the service performed for, and interest manifest in the affairs of, the firm shown by evidence which is practically free from conflict, we are of the opinion that the trial court was fully warranted in concluding that Simmons remained a partner in the firm at all times from its original organization in 1903 until after the making of the note sued upon in this action. This being true, we need give no attention to the question of Simmons being estopped by reason of representations made to the bank. We have noticed what occurred at the bank at the time of the signing of the first note by Simmons for the firm, merely as an item of evidence bearing upon the question of whether or not he was a partner in fact without reference to the question of estoppel. The case of *National Grocery Co. v. Simmons*, 63 Wash. 264, 115 Pac. 306, is closely related to this case, and lends some support to our conclusions upon this branch of the case, though that decision was evidently influenced more by estoppel.

It is finally contended that the trial court erred in providing in the judgment that it should be "enforcible out of the separate and community property of D. W. Simmons." At the time of the forming of the partnership in 1903, and of his contributing \$1,000 towards the capital thereof, Simmons was not married. He thereafter married Nellie E. Simmons in 1905. There is no language in the conclusions of law or judgment which could possibly be construed as establishing this judgment as an obligation against the community, other than that above quoted. It is not in terms a judgment against the community nor against Nellie E. Simmons. The argument of counsel for appellant proceeds upon the theory, however, that the judgment may be construed as being against the community. Counsel for respondent, while claiming that the judgment ought to have been in terms against the community, insists that:

"Appellant Nellie E. Simmons cannot complain of the judgment, because it is not a judgment against her or her

interest in the community property, although we believe that it should properly have been against the community and its property. She cannot complain because the judgment is enforceable out of the community personal property."

We agree with the position taken by counsel for respondent upon this question. It seems to us that this provision gives the judgment no more force than it would have without such provision.

We conclude that the judgment must be affirmed. It is so ordered.

DUNBAR, C. J., CROW, CHADWICK, and GOSE, JJ., concur.

[No. 10057. Department One. March 28, 1912.]

C. R. HADLEY, *as Receiver etc., Appellant*, v. BANK OF ELLENSBURG, *Respondent*.¹

CORPORATIONS—INSOLVENCY—PREFERENCE—EVIDENCE—SUFFICIENCY. Findings that a corporation, which was adjudged insolvent about a year after giving a mortgage for \$8,375, to secure an antecedent debt to a local bank, was not insolvent at that time, and that the mortgage was not an unlawful preference, are sustained where it appears that it was engaged in the retail meat business, that its total liabilities at that time did not exceed \$15,000 and its assets were valued by various witnesses at from \$15,000 to \$22,000, none of its creditors had manifested an intent to enforce collections by legal proceedings, it was paying its obligations in due course, and did about \$22,000 worth of business before it was closed up, and the mortgage covered only about one-half in value of its entire property.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered April 22, 1911, upon findings in favor of the defendant, dismissing on the merits an action to set aside a conveyance as fraudulent as to creditors. Affirmed.

Hovey & Hale, for appellant.

Pruyn & Hoeffler, for respondent.

¹Reported in 122 Pac. 321.

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Opinion Per PARKER, J.

PARKER, J.—This is an action to set aside a mortgage and the foreclosure thereof, upon the ground that it was executed by the Ellensburg Meat Company to the Bank of Ellensburg to secure an antecedent debt due from the meat company to the bank at a time when the meat company was insolvent. From a judgment upon the merits denying the relief prayed for, the plaintiff has appealed. The only question presented, is, was the meat company insolvent at the time it executed the mortgage, and did an unlawful preference in favor of the bank as a creditor result therefrom?

For some years prior to July, 1910, the meat company was engaged in the retail meat business in the city of Ellensburg, and also maintained a slaughterhouse in connection therewith on land owned by it near the city. On August 31, 1909, the meat company was indebted to the bank in the sum of \$8,375. On that day, to secure this indebtedness, the meat company executed to the bank the mortgage here involved, upon the land and slaughterhouse situated thereon. On July 16, 1910, the meat company was adjudged insolvent, and appellant was appointed receiver to take charge of its affairs, by the superior court for Kittitas county. Shortly before the appointment of appellant as receiver, the bank foreclosed its mortgage. The evidence is not entirely free from conflict touching the business and financial condition of the meat company at the time of the execution of the mortgage; but we think it warranted the trial court in believing the following facts established thereby. The meat company then had a total indebtedness of not over \$15,000. At that time it had property, which, according to the values testified to by various witnesses, was worth from \$15,000 to \$22,000. While some of its creditors were urging payment of their claims, none of them were then manifesting any disposition to enforce collection by legal proceedings. At that time it had a well established business and a fair prospect of future success. It was then able to pay its obligations in the due course of business, and so continued for at least a

considerable time thereafter. It is true that one of its debts was then in the form of a judgment amounting to \$1,365, but the enforcement of it was delayed by agreement with the judgment creditor, and a considerable sum thereafter paid upon the judgment. This judgment never was enforced by execution. During the period of about ten months intervening between the execution of the mortgage to the bank and the appointment of appellant as receiver, cash was received in the business amounting to about \$22,000. This represents approximately the amount of sales made during that period; the total amount of the book accounts not having materially changed. Of the indebtedness which existed at the time of giving the mortgage, there remained unpaid at the time of the appointment of appellant as receiver, only \$2,600. Other debts had been incurred during that period. The property covered by the mortgage, constituted about one-half, or possibly a little more, in value, of the entire property of the meat company and was its only real property. This being real property, it was of course burdened by the lien of the judgment, which lessened its value to that extent, as security to the bank.

The evidence of the condition of the meat company's affairs at the time it was adjudged insolvent, it is true, indicates that it had been in failing circumstances for some time previous thereto; but we do not think that the condition of the company's affairs shown to exist at that time were such as required the trial court to find that it was insolvent at the time of the execution of the mortgage to the bank some ten months previous, in view of the evidences showing its actual condition at that time.

We do not feel warranted in disturbing the disposition of the cause made by the trial court. The judgment is affirmed.

DUNBAR, C. J., CROW, CHADWICK, and GOSE, JJ., concur.

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[No. 10104. Department One. March 28, 1912.]

J. B. SMITH, *Respondent*, v. HURLEY-MASON COMPANY,
Appellant.¹

CONTRACTS—IMPLIED CONTRACT. The fact that a contractor took up the work of a defaulting subcontractor and made use of the remaining lumber sold and delivered to the subcontractor, does not imply a contract on the part of the contractor to pay the lumber company the price due for the lumber sold, no agreement with the subcontractor to that effect being shown, and there being no lien on the completed work for the material furnished.

APPEAL—REVIEW—FINDINGS—EXCEPTIONS. The absence of exceptions to the findings does not preclude inquiry as to whether the findings and admitted facts sustain the judgment.

Appeal from a judgment of the superior court for Cowlitz county, McKenney, J., entered July 22, 1911, upon findings in favor of the plaintiff, in an action on contract and to foreclose a materialman's lien against a railroad, after dismissal as to the railroad company and a trial to the court. **Reversed.**

T. L. Stiles, for appellant.

Joseph O'Neill, for respondent.

PARKER, J.—This action was originally commenced by the plaintiff, J. B. Smith, against E. F. Ackerman, Hurley-Mason Company, and Northern Pacific Railway Company, to recover judgment against the several defendants, and to foreclose a lien claim against certain culverts and the land on which they are situated, belonging to the railway company. The plaintiff's claim is for the value of lumber furnished to Ackerman, for the construction of the culverts, who had a subcontract under Hurley-Mason Company, which company had a contract with the railway company to construct the culverts. Long before the cause came to trial, it was dis-

¹Reported in 122 Pac. 361.

missed as to the railway company. This resulted in the foreclosure question being eliminated. The remaining issues were only such as are involved in an ordinary action at law for the recovery of a personal money judgment, and of course called for trial and disposition of the case as if it had been commenced for that purpose only. A trial before the court without a jury resulted in findings of fact upon which personal judgment was rendered against Hurley-Mason Company alone, from which it has appealed. While some contention is made upon the sufficiency of the complaint to state a cause of action against appellant, we think the cause can be disposed of more satisfactorily upon the trial court's findings and the admitted facts shown by the pleadings, which may be summarized as follows:

Appellant had a contract with the railway company to construct culverts on the line of its railway, and subcontracted the construction of some of them to Ackerman. It is plain from the pleadings that the relation of Ackerman to appellant was only that of an independent contractor. Ackerman proceeded with the work under his subcontract, and purchased lumber from respondent and Ostrander Railway & Timber Company to be used in carrying on the work. Thereafter appellant took possession of the work so subcontracted to Ackerman, and completed it, using the lumber then on the ground. There is nothing in the record showing the reason for appellant taking charge of the work it had subcontracted to Ackerman. It seems fair to assume, however, that it was because of some breach of the subcontract on the part of Ackerman. That, however, is of no consequence here. The only findings of fact made by the trial court are as follows:

"(1) That the plaintiff, J. B. Smith, between the 18th day of May and the 23d day of June, 1910, sold and delivered to E. F. Ackerman, 45,725 feet of lumber at the agreed value of \$480.47, and the Ostrander Railway & Timber Company, between the 10th day of May and the 14th day of June, 1910, sold and delivered to E. F. Ackerman

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lumber of the agreed value of \$373.11, and that said Ostrander Railway & Timber Company, prior to the commencement of this action assigned, transferred its claim for lumber sold and delivered to E. F. Ackerman to the plaintiff herein who is now the owner and holder of the same.

“(2) That the lumber sold and delivered as above specified has not been paid to either said plaintiff or said Ostrander Railway & Timber Company, and there is now due the plaintiff for said lumber, the sum of \$853.58.

“(3) That prior to the time the lumber was sold and at the time the same was delivered, the defendant, E. F. Ackerman, had a contract with defendant, Hurley-Mason Company, to furnish material and construct certain culverts; that the lumber sold and delivered to said E. F. Ackerman by the plaintiff, and the Ostrander Railway & Timber Company, was material which was necessary to complete the work which the said E. F. Ackerman had contracted to perform for the Hurley-Mason Company in constructing the culverts, and after said lumber had been delivered and before the same had all been used in prosecuting the work by the said E. F. Ackerman, the said Hurley-Mason Company took possession of the work which had been contracted to the said E. F. Ackerman, also all lumber which had been delivered by plaintiff and the Ostrander Railway & Timber Company, and used the same, which had not been used by said E. F. Ackerman in completing the work; that the defendant, Hurley-Mason Company received the full benefit of all said lumber and has not paid E. F. Ackerman for the part which was used in said culverts by him, nor has it paid anyone for any of the lumber sold and delivered by plaintiff or Ostrander Railway & Timber Company.”

The court's conclusions of law indicate that it was of the opinion that respondent was entitled to judgment against appellant upon the theory that, having used the lumber under these circumstances, it thereby assumed and agreed to pay respondent and the timber company therefor. Respondent's counsel requested the court to find certain facts evidencing a contract between appellant and Ackerman binding appellant to pay for the lumber, other than the facts found by the court as above quoted. The court refused to make the

requested findings. We mention this to show that the findings made by the court should in no event be construed as showing a contract binding appellant to pay respondent and the timber company for the lumber, unless the mere fact of the use of the lumber by appellant under the circumstances found by the court impliedly created a promise to pay therefor.

These facts, it seems to us, leave little to be said upon the subject of their legal effect upon the respective rights of the parties. When the lumber was sold and delivered by respondent and the Timber Company to Ackerman, of course the title to the lumber passed to Ackerman, and he thereby became indebted to them for the amount of the purchase price thereof. It may be that they also then acquired some lien rights against the property of the railway company; but it does not follow that appellant became personally liable for the payment of the purchase price of the lumber due from Ackerman. Appellant never used lumber belonging to respondent or the timber company. It was accountable to Ackerman only therefor. It is only by reason of some express statutory provision that respondent could even have a lien on the property which the lumber was furnished to improve. There is no law making appellant responsible for the value of the lumber, except only to the owner from whom it acquired the lumber. When I purchase property from another who has good title to it, I am liable only to him who sells to me, and do not have to see that he pays a debt which he contracted in acquiring the property. Of course, fraud, or a garnishee process, or some express statutory provision might affect the question of my personal liability; but nothing of that nature is here involved. We are of the opinion that under no view of the facts here shown, can appellant be held liable to respondent for the value of the lumber.

Some contention is made in behalf of respondent upon the theory that, to dispose of the cause in this manner, is in effect to review the findings when no exceptions were taken

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thereto. We are not reviewing the findings with a view of testing their truthfulness as statements of facts. No question of fact is here involved, but only the question of whether or not the facts admitted by the pleadings, together with these found by the court, sustain the judgment. The rule that findings of fact cannot be reviewed, in the absence of the evidence and exceptions, only has reference to reviewing the findings, together with the evidence upon which they are based, for the purpose of testing their truthfulness as statements of facts. The absence of the evidence and of exceptions to the findings does not stand in the way of this court's determining the question of whether or not the judgment is legally in accord with the findings and admitted facts. *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447; *Pack v. Peabody*, 58 Wash. 76, 107 Pac. 839.

The judgment is reversed and the action dismissed.

DUNBAR, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10066. Department One. March 28, 1912.]

CARMELA BROGNA, *Appellant*, v. GABRIELLE BROGNA,
Respondent.¹

APPEAL—REVIEW—FINDINGS. Findings of the trial court in a divorce case will not be disturbed, where they depend upon the weight of conflicting evidence.

DIVORCE—DIVISION OF PROPERTY. It is discretionary in granting a divorce, for the trial court to award all of the property to the husband, subject to the payment of reasonable alimony.

DIVORCE—CUSTODY OF CHILDREN. Where there is doubt as to the character of the wife, the court may award the custody of the children to her for a limited period only, subject to future revision.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 31, 1911, upon findings in favor of the defendant, in an action for a divorce,

¹Reported in 122 Pac. 1.

awarding the property to the defendant, and the temporary custody of the children to the plaintiff, with alimony. Affirmed.

John B. Van Dyke, Roger Marchetti, and Arthur E. Griffin, for appellant.

E. E. Wager, for respondent.

CROW, J.—This is an action for divorce. Plaintiff and defendant had two minor daughters, nine and six years of age; had accumulated property of the value of \$7,300, and were indebted in the sum of \$3,009.74. The wife as plaintiff asked the custody of the children, an equal division of the property, and a divorce on the ground of extreme cruelty. The husband by cross-complaint asked the custody of the children, and a decree of divorce for cruel treatment and adultery. The trial court entered a judgment by which it was decreed, that the real and personal property be awarded to the defendant; that the care, custody, and control of the children be awarded to the plaintiff for the period of four years from the date of the decree; that for the same period the defendant pay plaintiff \$30 per month for the maintenance and support of the minor children; that he pay her \$25 per month for her own support for the period of four years, or until the further order of the court; that said sums be a lien upon a portion of the real estate awarded to defendant; that he pay all their indebtedness and all costs incurred in this action; that he pay a \$50 fee to plaintiff's attorney, in addition to \$250 already paid; and that at the expiration of four years from the date of the decree, application may be made to the court for the future disposition of the minor children and for an additional allowance for their maintenance and support. From this decree, the plaintiff has appealed.

Appellant contends that a decree of divorce should have been awarded to her. While there was evidence which, if

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regarded as credible by the trial court, would have been sufficient to support a decree in her favor, there was also evidence in support of the cross-complaint sufficient to sustain the decree in respondent's favor. We are in no position to pass upon the credibility of the witnesses, or the weight of the conflicting evidence. That was done by the trial judge, and his findings will not be disturbed.

Shortly before the commencement of the action, appellant conveyed to respondent all her interest in the community real estate. In her complaint she alleged that her deed had been obtained by threats, duress, and intimidation, and asked that it be set aside. She now contends that the trial judge erred in refusing this demand. We cannot find that the deed was thus obtained; but, be that as it may, the trial judge, under Rem. & Bal. Code, § 989, was authorized to make such distribution of the property as should appear just and equitable, having due regard to the respective merits of the parties. This he did. The property was subject to a heavy indebtedness, which the respondent was required to assume and pay. The evidence was sufficient to satisfy the trial judge that a reasonable monthly allowance to appellant, for the maintenance of herself and children would afford her better support than would an interest in the incumbered real estate. From the record we are satisfied that the allowance thus made was just and equitable.

Complaint is made of the order awarding the custody of the children to appellant for four years only, and not permanently. The record justifies this order. There was evidence which strongly supported respondent's contention that the appellant had been guilty of adultery, although no such finding was made. If during the next four years appellant conducts herself in a proper manner, there is no reason why a further order may not then be made continuing the children in her custody, and making a further allowance for their support.

The controlling questions on this appeal are questions of fact. On the conflicting evidence shown by the record we conclude the decree should be affirmed. It is so ordered.

DUNBAR, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 9609. Department Two. March 28, 1912.]

WRIGHT RESTAURANT COMPANY *et al.*, *Appellants*, v.

SEATTLE RESTAURANT COMPANY *et al.*,

Respondents.¹

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION — INJUNCTION—COMPLAINT—SUFFICIENCY. Although there may be no exclusive right to use a proprietary trade-mark, nor any breach of contract as to good will, yet an injunction will be granted to restrain unfair competition by the fraudulent use of a trade-name, and the complaint states a cause of action, where it appears that a corporation had acquired from a partnership in the restaurant business the right to use the individual name of one of the partners, who had previously built up an enviable reputation and trade at a certain location in the city of S., with the right to conduct the business under such individual name, that such partner afterwards sold out his stock to his former partner, and soon after organized a new corporation and opened up and began conducting another restaurant and cafe in the same city within a block of the old location, with the same individual name printed in large letters on the front door in such a manner as to make the public believe that the old restaurant had moved to the new location, advertising the same in the daily papers and moving picture shows in the same misleading manner, to the plaintiff's damage.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 24, 1911, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Reversed.

Herbert E. Snook, for appellants.

Leopold M. Stern, for respondents.

¹Reported in 122 Pac. 348.

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ELLIS, J.—Action to enjoin the use of a trade-name in unfair competition. A general demurrer to the complaint was sustained. The action was dismissed. The plaintiffs have appealed.

The complaint in substance states that, for a long time prior to the incorporation of the plaintiff, Wright Restaurant Company, a corporation, the defendant, Chauncey Wright, was the sole owner of a restaurant, which he conducted at No. 164, Washington street, in the city of Seattle, under the name "Chauncey Wright's Cafe," which was painted in large letters upon the front window of the place of business; that he had built up a large and profitable trade; that he offered to sell to the plaintiff Charles Gearheart, for \$4,500, a one-half interest in the business, representing that under his name he had built up a business amounting to more than \$800 per month, net profit, and that if continued under the name of Chauncey Wright, the business would continue to be no less profitable; that, having investigated the business and found these representations true, the plaintiff Charles Gearheart, on October 6, 1909, purchased a half interest in the business, paying Wright therefor \$4,500 in cash; that before and at the time of the purchase, Wright emphasized the fact that his name at the head of the business and good will would insure a prosperous and lucrative business; that, after the purchase, and under the partnership name "Chauncey Wright's Cafe," Wright and Gearheart and the corporation afterwards organized did a prosperous business, of which the profits were in about the sum of \$800 per month up to October 6, 1910; that sometime prior to February 24, 1910, Wright and Gearheart concluded to incorporate, and it was agreed between them that the corporate name should be "Wright Restaurant Company," and that the name "Chauncey Wright's Cafe" should remain upon the front window of the restaurant, for the reason that Chauncey Wright was well known in that business and in that locality, and that his name was so identified with the business that it

would prosper under the incorporation as it had under the co-partnership; and that thereupon the parties did incorporate under the corporate name "Wright Restaurant Company," with a capital stock of 10,000 shares, of a par value of one dollar each, divided equally between Wright and Gearheart; that about October 6, 1910, Wright proposed to sell his 5,000 shares of stock to Gearheart for the sum of \$4,000 which proposal was acceded to by Gearheart, who received a transfer of the 5,000 shares from Wright, paying him therefor \$4,000; that the sale was made without reservation of any kind, and that Gearheart became the owner of the interests of Wright in the cafe, with the exclusive right to use the corporate name and the trade-name "Chauncey Wright's Cafe;" that soon after the sale of his stock in the Wright Restaurant Company, Chauncey Wright organized a corporation, the defendant Seattle Restaurant Company, of which he became president, and opened and began conducting, through that corporation, another restaurant and cafe at No. 110, Occidental avenue, in the city of Seattle, within the same block in which the plaintiff's restaurant is located, and caused his name "Chauncey Wright," in large letters, to be printed upon the front window thereof, followed in very much smaller letters by the words, "President, Seattle Restaurant Company;" that Chauncey Wright and the Seattle Restaurant Company so conduct and operate the restaurant under that name, for the purpose and with the intent to deceive the public and to make the public believe that the restaurant on Washington street has moved to Occidental avenue, and under the same auspices as Chauncey Wright's Cafe on Washington street, and that the public has received that impression and belief; that the defendants at once began and continue to advertise the new restaurant under the name "Chauncey Wright," as president of Seattle Restaurant Company, by means of moving picture shows and in the daily newspapers, in the same lettering as that upon the window, for the purpose and with the result of

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causing the general public to believe that Chauncey Wright had discontinued his restaurant on Washington street, and moved to and become reestablished at 110 Occidental avenue; that, since the name of Chauncey Wright has been advertised and exploited by the defendants in connection with the new restaurant, the business of the plaintiffs on Washington street has become impaired, and will be irreparably impaired if the defendants continue to use and exploit the name Chauncey Wright as they are now doing; that, prior to the commencement of this action, the plaintiffs notified the defendants not to open any restaurant on Occidental avenue, and not to use the name Chauncey Wright in connection therewith; that, by reason of the premises, the plaintiffs have already been damaged in the sum of \$2,000, and will be damaged in the further sum of \$10,000 if the use of the name by the defendants be continued, and that the plaintiffs will be deprived of a large percentage of their patronage unless the defendants be enjoined. The complaint then prays for an injunction restraining the defendants from using the name, or advertising their business on Occidental avenue under the name of Chauncey Wright, and for damages in the sum of \$12,000, and for general relief.

The demurrer, of course, admits as true every allegation of fact in the complaint. Do these facts constitute a cause of action? To answer this question intelligently we must not lose sight of the nature of the action. It was not an action to restrain the use of a proprietary trade-mark, nor to protect the sale of a good will. The first of these rests in the infringement of an exclusive proprietary right; the second, in breach of contract. The complaint here cannot be sustained upon either of these grounds. This action, if it can be maintained at all, must rest upon unfair competition by the fraudulent use of a trade-name. In such a case, no exclusive right in the plaintiffs to the use of the name need be shown. "In fact, the distinguishing feature of cases of unfair competition is the protection of one who has no

technical trade-mark and hence no exclusive property right." Paul on Trade-Marks, § 211. But the plaintiff in such a case must have the right to use the name, and he or his predecessor in interest must have actually enjoyed the prior use. When these things are shown, his use of the name will be protected by injunction against others using it unfairly to his injury. This court has so held:

"The rule seems to be well established, that 'a corporation may be enjoined from using a name or conducting its business under a name so similar to the name of a previously established corporation, association, partnership, or individual, engaged in the same line of business, that confusion or injury results therefrom.' " *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 98 Pac. 1116.

See, also, *Rosenburg v. Fremont Undertaking Co.*, 63 Wash. 52, 114 Pac. 886.

According to the allegations of the complaint, when the plaintiff Gearheart entered into partnership with the defendant, it was mutually agreed that the trade-name "Chauncey Wright's Cafe" should be used by the partnership. The right to use it thereby became a partnership asset. On the formation of the corporation "Wright Restaurant Company," it was also agreed that the name "Chauncey Wright's Cafe" should remain upon the window, and that the business of the corporation should be conducted in that name. Unquestionably the right to use the name as a trade-name passed to the corporation by the consent of all parties concerned. *Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill. 129, 52 N. E. 487; *Bissell Chilled Plow Works v. Bissell Plow Co.*, 121 Fed. 357.

"Sale of Business Site; effect of, on names.—This question is complicated often, because the name which is transferred is attached more or less definitely to some locality, building, or address, which has become really a part of the name and reputation of the business. This is true frequently of hotels, breweries, natural springs, newspapers, and the like. In such cases he who buys the buildings, or acquires the right to occupy them, will have the right to use the name attach-

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ing thereto, in the absence of very explicit contractual arrangement." Nims, Unfair Business Competition, § 54.

That right, being thus vested in the corporation, was a right which remained with it so long as it saw fit to use the name, regardless of the ownership of its stock. The sale of his stock by the respondent Wright in no manner affected this right. Nor was this right affected by the further circumstance that the distinctive feature of the trade-name was the name of the respondent Chauncey Wright.

"Thus, the outgoing stockholders of a corporation, the most distinguishing part of whose names the corporation bears, have no right to compete in business under a corporate name so nearly like the first as to mislead customers." Paul, Trade-Marks, § 216.

See, also, *Van Auken Co. v. Van Auken Steam Specialty Co.*, 57 Ill. App. 240; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Penberthy Injector Co. v. Lee*, 120 Mich. 174, 78 N. W. 1074. While these authorities deal with the *corporate* name as a trade-name or trade-mark, they are not based upon the fact that the name was acquired as a part of the corporate franchise, but upon the fact that the name was a *trade-name*, and so used by the corporation. *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 137 Ill. 231, 28 N. E. 248.

The rule is, therefore, equally applicable, whether the name used as a trade-name be that of a corporation or another name legally acquired and used by the corporation as a trade-name. In the foregoing cases and in cases where the parties have the same name or names *idem sonans*, the injunctive relief was granted, not because of any corporate franchise, but upon the broader principle that a man may not so use any name, not even his own name, as unfairly to compete with another person or corporation by confusing in the public mind his business with that of the competitor first using a trade-name of which the name in question was

the distinctive feature. *International Silver Co. v. Rogers Corp.*, 66 N. J. Eq. 119, 57 Atl. 1031, 2 Am. & Eng. Ann. Cases, 407; *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 Law Times, 259; *Royal Baking Powder Co. v. Royal*, 122 Fed. 337; *International Silver Co. v. Rogers Co.*, 110 Fed. 955; *Stuart v. Stewart Co.*, 91 Fed. 243; *Walter Baker & Co. v. Baker*, 87 Fed. 209; *Walter Baker & Co. v. Sanders*, 80 Fed. 889. Many other decisions of like import might be cited, but these will be sufficient to exemplify the rule.

A majority of the adjudicated cases involved the use of trade-names or trade-marks as applied to some specific article or class of manufacture or merchandise; but the rule is applied, and it seems to us with equal reason, to a trade-name when used in connection with a business of any kind so as to become affixed to the establishment. *Booth v. Jarrett & Palmer*, 52 How. Pr. 169. Such is the established rule as applied to names other than personal proper names, even though not names which might be exclusively appropriated as technical trade-marks. *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 42 Pac. 142, 50 Am. St. 57, 30 L. R. A. 182; *Martell v. St. Francis Hotel Co.*, *supra*; *Rosenburg v. Fremont Undertaking Co.*, *supra*.

Conceded, as it must be, that the right to use the personal name of another may be acquired, then the same rule of protection applies. The protection must be commensurate with the right. While every person has the undoubted right to use his own name in his own business, he cannot so use it as to unfairly compete with another with whose business that name has become identified and rightfully used as a trade-name. Such is the decided trend of the more modern authority. 28 Am. & Eng. Ency. Law (2d ed.), p. 426.

"Where a personal name has become identified with particular goods or a particular business so as to denote, in a secondary sense, such goods or business, a person of the same or a similar name subsequently engaging in the same

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business or dealing in the same goods must adopt affirmative precautions to prevent unnecessary confusion. Under such circumstances, the use of such a name by another person of the same name, unaccompanied by any precaution or indication of difference in itself amounts to a deceptive artifice or misrepresentation, and constitutes unfair competition." 28 Am. & Eng. Ency. Law (2d ed.), p. 428.

See, also, *Lever Bros. Ltd. Boston Works v. Smith*, 112 Fed. 998.

Applying the principles which we conceive to be established by the foregoing authorities to the complaint here, we are constrained to hold that it states a cause of action. In view of the near location of the respondents' place of business to that of the old concern, we cannot say that their use of the name "Chauncey Wright" as the distinguishing feature of their sign on the window, and in advertisements, both in the newspapers and by means of moving picture shows, was not reasonably calculated to divert patronage from the old concern, under a belief that the new had succeeded to the business of the old or was being conducted under the same auspices. That such was the design, seems plain. The unusual arrangement with the name "Chauncey Wright" placed first in conspicuously large letters, followed by the words "President Seattle Restaurant Company," in very much smaller lettering, could hardly have been adopted for any other purpose. In any event, the purpose is not important if the means employed were reasonably calculated to, and actually did, attract patronage under the mistaken belief. Whether they actually had that effect or not must be determined by evidence. We merely hold that it cannot be said, as a matter of law, that the means used were not such as might reasonably be expected to create confusion and unfairly divert patronage to the injury of the appellants.

Cases are not wanting in which courts have enjoined the use of signs and advertisements when so similar in their dominant features to those in use by another as to lead to such confusion, especially where the places of business are in

close proximity to each other. *Weinstock, Lubin & Co. v. Marks, supra*; *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14; *Johnson v. Hitchcock*, 3 N. Y. Supp. 680; *Cady v. Schultz*, 19 R. I. 193, 32 Atl. 915, 61 Am. St. 763, 29 L. R. A. 524.

The respondent Wright undoubtedly had the privilege of entering the restaurant business when and where he would, and to use his own name in connection therewith. It was, however, his duty to adopt such affirmative precautions in the use of his name as to prevent unnecessary confusion of his with the appellants' business.

The judgment is reversed, and the cause remanded with directions to overrule the demurrer and determine the issues upon evidence.

DUNBAR, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

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Opinion Per Curiam.

[No. 9952. Department Two. March 2, 1912.]

CLAUS F. DRISTIG, *Appellant*, v. COLUMBIA CANAL COMPANY,
Respondent.

ABRAHAM PETERSON, *Appellant*, v. COLUMBIA CANAL COMPANY,
Respondent.¹

Appeal from judgments of the superior court for Walla Walla county, Brents, J., entered July 26, 1911, dismissing actions of ejectment, after a trial to the court. Affirmed.

Rader & Barker and *H. B. Noland*, for appellant.

Shank & Smith and *Pedigo & Smith*, for respondent.

PER CURIAM.—This is an action to recover from the defendant the purchase price of a certain tract of land, in Walla Walla county, and the value of improvements placed thereon by the plaintiff, he having entered into possession under a contract for the purchase of the land with the Attalia Development Company. It is admitted that the defendant has succeeded to all the rights and obligations of the Attalia Development Company under the contract. There were two other actions against the defendant, brought at about the same time and resting on the same state of facts, one by Elmer D. Dristig, the other by Abraham Peterson. The three cases were, by stipulation of all parties, tried together, and are brought here upon the same statement of facts, with an agreement that they may all be disposed of on the one hearing. The actions were tried to the court without a jury, and a judgment of dismissal was entered in each. The actions are here on appeal from those judgments.

The facts presented are the same in every material particular as were those in *Skoog v. Columbia Canal Co.*, which was decided by this court on April 13, 1911, and reported in 63 Wash. 115, 114 Pac. 1034. Nothing is suggested tending to distinguish these cases from that. The decision in that case is, therefore, conclusive on the issues here. For the principles of law involved, a reference to that case will be sufficient. Upon the facts disclosed by the record, and in view of the decision in the *Skoog* case, the court could not have done otherwise than enter the judgments of dismissal. They are therefore affirmed.

¹Reported in 121 Pac. 1135.

[No. 10033. *En Banc*. March 26, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. ALFRED E. COHEN,
Appellant.¹

Appeal from a judgment of the superior court for King county, Main, J., entered June 20, 1911, upon a trial and conviction of false registration. Reversed.

R. L. Blewett, Frank E. Hammond, and Gill, Hoyt & Frye, for appellant.

John F. Murphy and Geo. H. Rummens, for respondent.

PER CURIAM.—The proper disposition of this cause is governed by the decision rendered by department one on December 2, 1911, in the case of *State v. Ross*, 66 Wash. 138, 119 Pac. 20, which decision was affirmed by the court *en banc* upon petition for rehearing, this day. *Id.*, 66 Wash. 141, 122 Pac. 8. The questions determinative of this case being the same as in that, the judgment of the trial court is reversed for the reasons there stated.

¹Reported in 122 Pac. 10.

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12. APPEAL—RIGHT TO ALLEGE ERROR—COPARTY NOT APPEALING. A plaintiff, dismissed from a case with prejudice, cannot have error thereon reviewed on an appeal by defendants, where the record fails to disclose that he took any appeal. *Akers v. Lord*..... 179
13. APPEAL—REVIEW—VERDICT. A verdict will not be disturbed on appeal where the evidence is conflicting and sufficient to sustain a finding either way. *Fronhofer v. Inland Navigation Co*..... 171
14. APPEAL—REVIEW—VERDICT. An award in condemnation will not be reversed on appeal as inadequate, where it is well within the evidence of disinterested witnesses, and the trial court refused to interfere after hearing and seeing the witnesses. *Walla Walla v. Dement Brothers Co*..... 186
15. APPEAL—REVIEW—VERDICT. A verdict will not be set aside as contrary to the evidence, or as excessive, where there was competent evidence to support it. *Brennan v. Healy*..... 258
16. APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence, submitted under proper instructions, will not be disturbed on appeal, where there is substantial evidence to support it. *Parker v. Minnesota Linseed Oil Paint Co*..... 348
17. APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence will not be disturbed on appeal when supported by substantial evidence. *Breese v. Hunt*..... 398
18. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence, will not be disturbed on appeal if sustained by sufficient evidence, where the trial judge heard and saw the witnesses. *Hillman v. Donaldson*: 410
19. APPEAL—REVIEW—FINDINGS—CONSTRUCTION. Where the evidence is brought up on appeal, the findings will not be given a technical construction, but the case will be considered on its merits. *Gibson v. Gibson* 474
20. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, when sustained by a preponderance of the evidence. *Hofstetter v. Sound Trustee Co*..... 537
21. APPEAL—REVIEW—FINDINGS. Findings of the trial court in a divorce case will not be disturbed, where they depend upon the weight of conflicting evidence. *Broгна v. Broгна*..... 687
22. APPEAL—REVIEW—HARMLESS ERROR. Error in denying a change of venue is not prejudicial, where on trial *de novo*, the judgment must be sustained in any event. *Stahl v. Schwartz*..... 25

APPEAL AND ERROR—CONTINUED.

5. **APPEAL—REVIEW—OBJECTIONS NOT PRESENTED BELOW.** An objection that evidence should have been struck out cannot be urged on appeal where no motion to strike was made below. *State v. Wappenstein* 502
6. **APPEAL—REVIEW—FINDINGS—EXCEPTIONS.** The absence of exceptions to the findings does not preclude inquiry as to whether the findings and admitted facts sustain the judgment. *Smith v. Hurley-Mason Co.* 683

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

7. **APPEAL—BONDS—OBLIGORS.** An appeal will be dismissed where the bond on appeal was given by one as principal who was not a party to the action, and conditioned that he would pay any judgment that might be rendered against him, and against whom no judgment could be rendered. *Canal Lumber Co. v. Kong Yick Investment Co.* 126
8. **APPEAL—NOTICE OF APPEAL — PARTIES — DISCLAIMER OF INTEREST.** Upon appeal from a judgment in an action to quiet title, defendants who appeared and filed an answer amounting to a disclaimer asking no costs or relief, and setting up no title or interest as required by Rem. & Bal. Code, § 794, are not necessary parties to the appeal upon whom notice of appeal need be served, where they ceased to have any interest in the controversy, were treated as if in default in all subsequent proceedings, and were not mentioned in the decree except in the caption. *Soderberg v. McRae*..... 104

X. RECORD.

9. **APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS—MOTION TO VACATE JUDGMENT.** Affidavits annexed to a motion to vacate a judgment and by reference made a part of the motion, cannot be made a part of the record by the certificate of the clerk, and will not be considered on appeal in the absence of any statement of facts or bill of exceptions. *Hayworth v. McDonald*..... 496
10. **APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING.** A statement of facts which was not filed until more than four months after entry of the judgment, is too late, and will be struck out on motion. *Williams v. Spokane*..... 368
11. **APPEAL—RECORD—TRANSCRIPT—SUPPLEMENTAL TRANSCRIPT—JURISDICTION—TIME FOR TAKING APPEAL—MOTION FOR NEW TRIAL.** Where the original transcript failed to show the filing marks below that would make the appeal within time to give jurisdiction, it may be shown by a supplemental transcript that the time for taking an appeal was suspended by the pendency of a motion for a new trial seasonably made, and time for taking an appeal would run from

APPEAL AND ERROR—CONTINUED.

the denial of the motion, and not the date of the judgment. *Wells & Morris v. Brown*..... 351

XVI. REVIEW.

12. APPEAL—RIGHT TO ALLEGE ERROR—COPARTY NOT APPEALING. A plaintiff, dismissed from a case with prejudice, cannot have error thereon reviewed on an appeal by defendants, where the record fails to disclose that he took any appeal. *Akers v. Lord*..... 179
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16. APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence, submitted under proper instructions, will not be disturbed on appeal, where there is substantial evidence to support it. *Parker v. Minnesota Linseed Oil Paint Co*..... 348
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19. APPEAL—REVIEW—FINDINGS—CONSTRUCTION. Where the evidence is brought up on appeal, the findings will not be given a technical construction, but the case will be considered on its merits. *Gibson v. Gibson* 474
20. APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed on appeal, when sustained by a preponderance of the evidence. *Hofstetter v. Sound Trustee Co*..... 537
21. APPEAL—REVIEW—FINDINGS. Findings of the trial court in a divorce case will not be disturbed, where they depend upon the weight of conflicting evidence. *Broyna v. Broyna*..... 687
22. APPEAL—REVIEW—HARMLESS ERROR. Error in denying a change of venue is not prejudicial, where on trial *de novo*, the judgment must be sustained in any event. *Stahl v. Schwartz*..... 25

APPEAL AND ERROR—CONTINUED.

23. **APPEAL—REVIEW—HARMLESS ERROR—OBJECTIONS WAIVED.** Error cannot be predicated upon a referee's allowance of an amendment to the pleadings, where the party was not misled and offered evidence on the issue, and did not make the specific objection in opposing affirmation of the referee's report. *Walsh Lumber Co. v. Chaney* 583
24. **APPEAL—REVIEW—HARMLESS ERROR—TRIAL—ARGUMENT OF COUNSEL.** The arbitrary interruption by the court of proper argument of counsel, as going beyond the instructions, will be held harmless error, unless it appears from the whole record that otherwise a different verdict would probably have been returned. *International Mercantile & Bond Co. v. Shaw-Wells Co.* 369
25. **APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.** In an action for services as a trained nurse, the admission of irrelevant evidence as to articles furnished by the plaintiff is not prejudicial, where there was no evidence of their value and the instructions only permitted recovery for the reasonable value of the service. *Brennan v. Healy* 258
26. **APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.** The admission of immaterial evidence is harmless where it could not have misled the jury. *Breese v. Hunt* 398
27. **APPEAL—REVIEW—HARMLESS ERROR.** In a prosecution for violating the local option law, it is harmless to receive in evidence the certificate of a Federal internal revenue collector that a special tax stamp had been issued to defendant as a retail liquor dealer, where defendant testified that he had purchased such a tax stamp. *State v. Baker* 595
28. **APPEAL—REVIEW—HARMLESS ERROR.** Error in excluding evidence is cured where the fact was established by other evidence. *State v. King* 651
29. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** In a personal injury case, an irrelevant instruction going only to the measure of damages is not prejudicially erroneous, where the verdict was reduced by the trial judge in a substantial degree. *Lynch v. Northern Pac. R. Co.* 113
30. **APPEAL—REVIEW—HARMLESS ERROR—COUNTERCLAIM—INSTRUCTIONS.** Upon breach of a logging contract by defendant, an instruction that the defendant could counterclaim for damages sustained by reason of plaintiffs' failure to fully perform the contract is error favorable to the defendant of which he cannot complain. *Palmer v. Huston* 210
31. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** It is harmless error to give an instruction as to plaintiff's right to recover, although negligent, if the defendant had the last clear chance to

APPEAL AND ERROR—CONTINUED.

avoid the accident, there being no evidence warranting its submission, where the jury by a special verdict found that the plaintiff was not guilty of contributory negligence. *Richmond v. Tacoma R. & Power Co.*..... 444

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

32. **APPEAL—DECISION—LAW OF CASE—MATTERS CONCLUDED—DENIAL OF NEW TRIAL.** Upon a former appeal, the reversal of a judgment for defendant notwithstanding a verdict for the plaintiff, upon the ground that the evidence made a case for the jury, establishes the facts as found by the verdict as the law of the case; and on remand, a new trial for insufficiency of the facts to sustain the verdict is properly denied, either as conclusively settled or as within the discretion of the trial court. *Budman v. Seattle Electric Co.*..... 133

APPEARANCE:

To prevent default judgment, see **JUDGMENT**, 1.

APPLICATION:

For change of venue, see **VENUE**, 3.

APPORTIONMENT:

Of assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 7-9.

APPROVAL:

Of referee's report, see **REFERENCE**.

ARBITRATION AND AWARD:

See **REFERENCE**.

ARCHITECTS:

Certificate as to work under contract, see **CONTRACTS**, 4.

Change in building plans, see **MECHANICS' LIENS**, 3.

ARGUMENT OF COUNSEL:

Interruption by court as harmless error, see **APPEAL AND ERROR**, 24.

ASSAULT:

Injury to passenger from assault by deckhand, see **CARRIERS**, 2.

Variance between charge and proof as to identity of person, see **INDICTMENT AND INFORMATION**, 4.

ASSESSMENT:

Omitting lien of in abstract, see **ABSTRACTS OF TITLE**.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 7-10.

Of tax, see **TAXATION**, 4.

ASSETS:

Embezzlement of effects of estate, see **EXECUTORS AND ADMINISTRATORS**, 1.

ASSIGNMENTS:

Corporate shares, see **CORPORATIONS**, 1-3.

Leases, see **LANDLORD AND TENANT**, 2.

Bringing in new parties in action on assigned account, see **PARTIES**, 1.

ASSUMPTION:

Of risk by employee, see **MASTER AND SERVANT**, 5-7.

As to speed of car at crossing, see **STREET RAILROADS**, 6, 7.

ATTENDANCE:

Of witness, see **WITNESSES**, 4.

ATTORNEY AND CLIENT:

Attorney's fees in action on note, see **BILLS AND NOTES**, 3.

Argument and conduct of counsel at trial in criminal prosecutions, see **CRIMINAL LAW**, 13, 14.

Allowance of counsel fees in divorce proceedings, see **DIVORCE**, 2, 3, 8.

Misconduct as ground for new trial, see **NEW TRIAL**, 2.

1. **ATTORNEY AND CLIENT—DUTIES—CONVERSION—BY TRUSTEE—EVIDENCE—SUFFICIENCY.** An attorney holding stock in a corporation as a trustee for his client and to indemnify him upon his indorsement of a note, is guilty of a conversion thereof, where he transferred part of his stock to a business associate, called a meeting of the stockholders, ousted his client from office, organized a new corporation, and transferred to it all the assets of the old corporation by voting the stock; his acts being construed most strongly against him, and the burden being upon him to show that his dealings were free from all reasonable grounds of suspicion. *Hertick v. Smith* 664

AUTHORITY:

Of local agent, see **BENEFICIAL ASSOCIATIONS**, 2.

To fix telephone rates, see **CONSTITUTIONAL LAW**, 1.

Of corporate officers or agents, see **CORPORATIONS**, 1, 2, 5.

Of architect to order change in contract, see **MECHANICS' LIENS**, 3.

Of agent, see **PRINCIPAL AND AGENT**, 2.

Of public service commission to require increase in rates of telephone company, see **TELEGRAPHS AND TELEPHONES**.

AUTOMOBILES:

Collision with person in city street, see **MUNICIPAL CORPORATIONS**, 18.

AWARD:

Of property on divorce, see **DIVORCE**, 7, 8.

In condemnation proceedings, see **EMINENT DOMAIN**, 4.

BANKRUPTCY:

1. **BANKRUPTCY—TRANSFERS — ACTION BY TRUSTEE — CORPORATIONS—CAPITAL STOCK—UNLAWFUL REDUCTION — FRAUD — SUBSEQUENT CREDITORS.** Where a corporation, before bankruptcy, unlawfully reduced its capital stock by purchasing the stock of its president, the trustee in bankruptcy may maintain an action to recover the money paid without alleging the existence of creditors at the time of the unlawful sale; since subsequent creditors are equally entitled to redress. *Union Trust Co. v. Amery*..... 1
2. **BANKRUPTCY—FRAUDULENT TRANSACTIONS — ACTION BY TRUSTEE—STATUTES.** The bankruptcy act does not require that creditors should first acquire a lien before the trustee can sue to set aside an unlawful transaction in fraud of the rights of creditors. *Union Trust Co. v. Amery*..... 1

BAR:

Of action by former adjudication, see JUDGMENT, 5-10.
Of action by limitation, see LIMITATION OF ACTIONS.

BENEFICIAL ASSOCIATIONS:

1. **BENEFICIAL ASSOCIATIONS—AGENTS—CLERK OF LOCAL CAMP — BY-LAWS.** The clerk of a local camp of a fraternal beneficial society is the agent of the society, and his knowledge is its knowledge, notwithstanding by-laws to the contrary effect, where he was the officer who collects, receipts for, and transmits the assessments, and the society had no other fund from which to pay death losses and no other means of collecting the assessments. *Shultice v. Modern Woodmen of America*..... 65
2. **BENEFICIAL ASSOCIATIONS—FORFEITURE OF MEMBERSHIP—NONPAYMENT OF DUES—BY-LAWS—WAIVER—POWERS OF LOCAL AGENT.** Notwithstanding by-laws of a fraternal beneficial society limiting the right of delinquent members to reinstatement to those in good health, and providing that no local camp or officer can waive the by-laws, the society is liable on a death loss, where, after knowledge of suspension, it accepted and retained his monthly assessments, collected and transmitted by the local clerk with knowledge that the member had become insane; such notice of bad health to the local clerk being notice to the society whether communicated or not. *Shultice v. Modern Woodmen of America*..... 65

BENEFITS:

Acceptance of as ground of estoppel, see ESTOPPEL.

BEQUESTS:

See WILLS.

BIAS:

Of judge ground for change of venue, see VENUE, 2.

BILL OF SALE:

See SALES, 4.

BILLS AND NOTES:

Extortion of check, see EXTORTION.

1. **BILLS AND NOTES—CONSIDERATION—DEFENSES.** False representations on the sale of a draying outfit by a bank to a partnership, are not a defense to a note for \$500, given by one of the partners and another person to the bank in connection with the sale, and discounted, and placed to the credit of the copartnership, and used in part payment of the outfit, since the consideration of the note was an actual loan of \$500. *Aurora Land Co. v. Keevan*..... 305
2. **BILLS AND NOTES — PAYMENT — CONTRACTS — FOR SECURITY—CONSTRUCTION—ACCEPTING MORTGAGE.** Where an agreement between the makers and the payee of a note for \$3,500, provided that out of \$11,500 to be received from the sale of a steamer (upon which the payee held a chattel mortgage for \$10,000) the payee should pay certain claims, applying the balance on his mortgage, and that the payee was entitled to hold the \$3,500 until he had received his full claim (the makers acknowledging their liability thereon, less an agreed credit, to the amount of the payee's loss in the transaction, if any, up to the amount of said note less the credit, upon the sale of the steamer to the payee of the note, who received but \$1,000 and took a chattel mortgage for \$10,500 for the balance, upon which the purchaser of the steamer defaulted) the \$3,500 was not paid by the transaction but was held as security for the payee's losses; since the payee did not accept the mortgage as cash. *Barron v. Robinson*. 656
3. **SAME.** Such losses of the payee included money paid for attorneys' and court fees in resisting claims upon the advice of counsel and insurance on the steamer stipulated for in the mortgage. *Barron v. Robinson*..... 656

BONA FIDE PURCHASER:

At execution sale, see EXECUTION.

BONDS:

Amount of judgment in action on indemnity bond as determining right to appeal, see APPEAL AND ERROR, 1.

On appeal, see APPEAL AND ERROR, 7.

Validity of default on bond in amount exceeding penalty, see JUDGMENT, 2.

Contractor's bonds, see MUNICIPAL CORPORATIONS, 5, 6.

Subject and title of act requiring bonds from contractors on public work, see STATUTES, 3, 4.

BOOKS OF ACCOUNT:

Admissibility in evidence, see EVIDENCE, 3-5.

BOOM COMPANIES:

Right to tolls for improving stream, see LOGS AND LOGGING, 2.

BOUNDARIES:

1. **BOUNDARIES—PLATS—CONSTRUCTION—LOCATION OF LINE.** Where the northwest corner of a plat is $8\frac{1}{4}$ feet south of the government subdivision, and the northeast corner is 21.44 feet south of the same line, the true north line of the townsite is the north line of the north tier of blocks as actually marked on the plat and not the government subdivision line. *Goldbach v. Gaines*..... 260
2. **BOUNDARIES—AGREED LOCATION—EVIDENCE—SUFFICIENCY.** It cannot be claimed that there was an agreed location of a boundary along a blazed line, where one of the parties refused to build a fence thereon until it was surveyed, and the other did not know exactly where the line was and agreed that the line was subject to survey. *Goldbach v. Gaines*..... 260
3. **BOUNDARIES — SURVEYS — LOST CORNERS—LOCATION OF LINE—EVIDENCE—SUFFICIENCY.** Plaintiff's evidence, that he, not being a surveyor, established a disputed center line of a section by measuring forty chains east of the southwest corner of the section, is insufficient to sustain a verdict finding that to be the true location of the line, where the true quarter corner was established in accordance with the rules for relocating lost corners on a straight line between and equidistant from the section corners, by an experienced and disinterested surveyor, who made an accurate survey and found the south line of the section to exceed one mile by 528 feet. *Koenig v. Whatcom Falls Mill Co.*..... 632

BREACH:

Of contract, see CONTRACTS, 1, 4.

Of lease, see LANDLORD AND TENANT, 5, 6.

Of logging contract, see LOGS AND LOGGING, 1.

Of contract of sale, see SALES.

Of warranty, see SALES, 5-7.

Of contract to furnish water for irrigation, see WATERS AND WATER COURSES, 2, 3.

BRIBERY:

See CRIMINAL LAW, 1-4, 7, 11; INDICTMENT AND INFORMATION, 1, 3.

1. **BRIBERY — ACCEPTING BRIBE — EVIDENCE — SUFFICIENCY.** There is sufficient evidence to sustain a conviction of a chief of police of soliciting and accepting bribes under an agreement with two others to allow them to conduct houses of prostitution, where the evidence of the two conspirators establishing the agreement and offense was corroborated by the fact of their securing and conducting two certain houses immediately thereafter, by the defendant's consent, and

BRIBERY—CONTINUED.

corroboration as to the payment of sums of money at various times, and the deposit of large sums by the defendant or members of his family. *State v. Wappenstein*..... 502

BROKERS:

See **PRINCIPAL AND AGENT**, 1.

Agreement between for commissions as within statute of frauds, see **FRAUDS, STATUTE OF**, 5.

BUILDING CONTRACTS:

See **CONTRACTS**, 4; **MECHANICS' LIENS**, 3.

BURDEN OF PROOF:

Instructing as to burden upon defendant to reduce degree of crime, see **HOMICIDE**, 7.

BY-LAWS:

See **BENEFICIAL ASSOCIATIONS**.

CANALS:

Damages from flooding from irrigation canal, see **WATERS AND WATER COURSES**, 4.

CANCELLATION OF INSTRUMENTS:

Cancelling fraudulently issued stock, see **CORPORATIONS**, 3.

Rescission of contract, see **SALES**, 3.

CARRIERS:

Evidence of mental shock sustained by passenger in collision, in action for damages, see **EVIDENCE**, 2.

1. **CARRIERS — INJURY TO PASSENGERS—EVIDENCE—RELEVANCY—DAMAGES—APPEAL—HARMLESS ERROR.** Upon an issue as to the amount of damages sustained by a passenger in a head-on railway collision, in which several passengers were killed, the company admitting negligence causing the accident, it is not prejudicial error to receive in evidence a photograph of the wrecked train showing the force and disastrous nature of the wreck. *Taylor v. Spokane, Portland & Seattle R. Co.*..... 96
2. **CARRIERS — INJURIES — OWNERSHIP OF VESSEL — QUESTION—SUFFICIENCY.** A navigation company selling a ticket for passage on a boat, is not liable for an assault by a deckhand on the boat, where there was no evidence that it owned or operated the boat. *Fronhofer v. Inland Navigation Co.*..... 171

CASUALTY INSURANCE:

Action on policy, see **INSURANCE**.

CERTIFICATE:

- Of abstracter, construction of, see ABSTRACTS OF TITLE.
- Of architect as to performance or breach of building contract, see CONTRACTS, 4.
- Of corporate stock, see CORPORATIONS, 1, 2, 3.
- As proof of payment of corporate license fee, see CORPORATIONS, 7.
- Tax certificate, see TAXATION, 2.

CESSATION OF CONTROVERSY:

- On appeal, see APPEAL AND ERROR, 3; EMINENT DOMAIN, 4.

CHANGE:

- Of domicile, see DOMICILE.

CHANGE OF VENUE:

- Of civil actions, see VENUE.

CHARGE:

- To jury in criminal prosecutions, see CRIMINAL LAW, 15, 16, 19.
- To jury in civil actions, see TRIAL, 2.

CHARTER:

- Of municipal corporation, see MUNICIPAL CORPORATIONS, 1, 17.

CHATTEL MORTGAGES:

- See BILLS AND NOTES, 2.

1. CHATTEL MORTGAGES—CONSTRUCTION—RIGHTS OF MORTGAGEE—POSSESSION—REPLEVIN. A provision in a chattel mortgage that in case of default the mortgagee may take immediate possession and proceed to sell the same in the manner provided by law, must be construed to have reference to the taking of possession by the method provided by statute for the foreclosure thereof, as an exclusive remedy; and consequently replevin cannot be maintained. *Nettleton v. Evans*..... 227

CHECKS:

- Extortion of check without cash value, see EXTORTION.

CHILD:

- See INFANTS.

CHURCH:

- Property of as exempt from taxation, see TAXATION, 1, 2.

CIRCUMSTANTIAL EVIDENCE:

- In civil actions, see EVIDENCE, 1.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Equal protection of laws, see CONSTITUTIONAL LAW, 5.

CIVIL RIGHTS:

See CONSTITUTIONAL LAW, 5.

CLAIMS:

Against county, see COUNTIES.

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2, 3.

Excessive claim in lien notice, see MECHANICS' LIENS, 4.

Against city, presenting, see MUNICIPAL CORPORATIONS, 22, 24.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 5.

COLLATERAL ATTACK:

Upon vacation of judgment, see JUDGMENT, 2.

On tax judgment, see TAXATION, 3.

COLLATERAL UNDERTAKING:

See FRAUDS, STATUTE OF, 1, 2.

COLLISION:

Of railway trains, see CARRIERS, 1.

In city street between automobile and pedestrian, see MUNICIPAL CORPORATIONS, 18.

COLOR OF TITLE:

To sustain adverse possession, see ADVERSE POSSESSION, 2.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

COMMISSIONERS:

Construction of act providing for public service commission, see STATUTES, 1.

Power of public service commission to raise rates of telephone company, see TELEGRAPHS AND TELEPHONES.

COMMISSIONS:

Agreement between brokers for as within statute of frauds, see FRAUDS, STATUTE OF, 5.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 2-4.

COMPENSATION:

For property taken or damaged for public use, see EMINENT DOMAIN, 3, 4.

Tender of by county for land taken for road, see HIGHWAYS, 2.

To boom company for improving stream, see LOGS AND LOGGING, 2.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 9.

Of witnesses in general, see WITNESSES, 1, 2.

COMPETITION:

Unfair competition by fraudulent use of trade-name, see TRADE-MARKS AND TRADE-NAMES.

COMPLAINT:

In criminal prosecutions, see INDICTMENT AND INFORMATION.

In civil actions, see PLEADING.

CONCLUSION:

Of witness, see EVIDENCE, 9.

CONCLUSIVENESS:

Of judgment, see JUDGMENT, 5-10.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONS:

Precedent to action by corporation, see CORPORATIONS, 7.

Precedent to foreclosure of mechanics' lien against property of estate, see EXECUTORS AND ADMINISTRATORS, 2, 3.

CONDUCT:

Of attorney ground for new trial, see NEW TRIAL, 2.

CONFIRMATION:

Of establishment of county road, see HIGHWAYS, 2.

CONSENT:

To crime of incest, see INCEST, 1.

CONSIDERATION:

Of bill of exchange or promissory note, see BILLS AND NOTES, 1.

Of contract, see CONTRACTS, 2, 3.

For oral promise to pay debt of another, see FRAUDS, STATUTE OF, 4.

CONSPIRACY:

Accepting bribe under conspiracy to violate law, see **CRIMINAL LAW**, 1-4, 7, 9, 11.

Proof of as element of offense of bribery, see **INDICTMENT AND INFORMATION**, 1.

CONSTITUTIONAL LAW:

Restriction on delegation of legislative power to city, see **MUNICIPAL CORPORATIONS**, 17.

Limitation of city indebtedness, see **MUNICIPAL CORPORATIONS**, 20, 21.

Enactment and validity of statutes, see **STATUTES**.

1. **CONSTITUTIONAL LAW — POLICE POWER—AUTHORITY TO FIX TELEPHONE RATES.** It is within the police powers of the state to regulate telegraph and telephone rates by surrendering the control to a properly constituted commission, subject to judicial review, under art. 12 of the Const., providing for the organization of corporations and declaring telegraph and telephone companies to be common carriers subject to legislative control. *State ex rel. Webster v. Superior Court* 37
2. **CONSTITUTIONAL LAW — POLICE POWER—HOURS OF SERVICES—REASONABLENESS—EVIDENCE—ADMISSIBILITY.** Under Laws of 1911, p. 131, providing that no female shall be employed eight hours during any day in any mechanical or mercantile establishment, laundry, hotel, or restaurant, except in harvesting, packing, curing or canning perishable fruit, vegetables or fish, the unconstitutionality of the act as an arbitrary and unwarranted exercise of the police power cannot be shown by evidence that defendant's factory was sanitary and healthful, the labor of female employees light and harmless, and that they could be employed for nine hours a day without endangering or impairing their health or physical condition; since the courts can look only to the law itself and scientific facts of which it can take judicial notice. *State v. Somerville*..... 638
3. **CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — MUNICIPAL FRANCHISES — POWER OF STATE TO ABROGATE — POLICE POWER—TELEGRAPHS AND TELEPHONES—RATES.** The power to fix rates being reserved by the constitution, the same is not an incident to the right of a city to frame a special charter; and there being no express grant or waiver of the constitutional reservation, a city franchise to a telephone company granted under authority of a special charter is a mere license or permission, subject to control by the police power of the state, and the obligations thereof are not binding upon the state as a contract within the meaning of the Federal constitution. *State ex rel. Webster v. Superior Court*..... 37
4. **CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS—FRANCHISES—ABROGATION—PARTIES ENTITLED TO QUESTION — MUNICIPAL CORPORATIONS—TELEPHONE AND TELEGRAPHS—RATES.** Where a city, in grant-

CONSTITUTIONAL LAW—CONTINUED.

- ing a franchise to a telephone company fixing maximum rates, reserved the right to alter, amend or annul the conditions of the franchise, it cannot raise the objection that the state, in raising the rates in the exercise of its police power, will impair the obligations of the contract. *State ex rel. Webster v. Superior Court*..... 37
5. SAME—CLASS LEGISLATION—EQUAL PROTECTION OF THE LAWS. Such act does not violate the constitutional prohibition against class legislation or deprivation of equal protection of the laws by reason of the exceptions enumerated in the proviso; the classification being within the discretion of the legislature and founded on a reasonable basis. *State v. Somerville*..... 638
6. CONSTITUTIONAL LAW—DUE PROCESS—RIGHT TO CONTRACT—FEMALE LABOR—EIGHT-HOUR DAY. Laws of 1911, p. 131, providing that no female shall be employed more than eight hours during any day in any mechanical or mercantile establishment, laundry, hotel, or restaurant, except in harvesting, packing, curing or canning perishable fruit, vegetables or fish, is not unconstitutional as depriving employers and employees in the enumerated callings of their right to contract without due process of law; all doubts being resolved in favor of the validity of the law. *State v. Somerville*..... 638

CONSTRUCTION:

- Of certificate of abstracter, see ABSTRACTS OF TITLE.
- Of findings on appeal, see APPEAL AND ERROR, 19.
- Of agreement for security of payee of note, see BILLS AND NOTES, 2.
- Of plat to determine boundary, see BOUNDARIES, 1.
- Of provision for possession on default of mortgagee, see CHATTEL MORTGAGES.
- Of law relating to reinstatement of corporation after failure to pay license fee, see CORPORATIONS, 9.
- Of statute requiring indorsement of name of witness on information, see CRIMINAL LAW, 8.
- Of statute giving damages to widow or children for wrongful death, see DEATH.
- Of statute defining false registration, see ELECTIONS.
- Mistake in construing will as ground for equitable relief, see EQUITY.
- By court of promise to pay debt or default of another, see FRAUDS, STATUTE OF, 2.
- Of law providing punishment for contributing to delinquency of child, see INFANTS.
- Of local option law as affecting sales by wholesale dealers, see INTOXICATING LIQUORS, 1.
- Of statutes relating to vacation of judgments for recovery of real property, see JUDGMENT, 3.
- Of lease, see LANDLORD AND TENANT, 2, 3.
- Of statute giving logger's lien on lumber, see LOGS AND LOGGING, 3.

CONSTRUCTION—CONTINUED.

- Of statute requiring contractor's bond on public work, see **MUNICIPAL CORPORATIONS**, 6.
- Of statute requiring claims for personal injuries, see **MUNICIPAL CORPORATIONS**, 22.
- Of statutes, general laws, see **STATUTES**, 1.
- Of statute exempting church property from taxation, see **TAXATION**, 1.
- Of water contract, see **WATERS AND WATER COURSES**, 1.
- Of will, see **WILLS**.

CONTEMPT:

- Finality of orders in, see **APPEAL AND ERROR**, 2.
 - For failure to pay alimony, see **DIVORCE**, 4, 6.
 - Prohibiting illegal punishment for, see **PROHIBITION**, 2.
 - For refusal to obey order requiring attendance as witness, see **WITNESSES**, 4.
1. **CONTEMPT—CIVIL CONTEMPT—DAMAGES—RIGHT TO JURY TRIAL.** The right to trial by jury does not extend to proceedings for contempt for the wilful violation of a judgment, although damages for civil contempt are claimed and may be awarded on summary trial by the court, under Rem. & Bal. Code, §§ 1053, 1056. *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*..... 317
 2. **CONTEMPT—CIVIL CONTEMPT—AFFIDAVIT—SUFFICIENCY.** An affidavit for civil contempt for the violation of a judgment is sufficient where it sets out a wilful violation of the order and the damages caused thereby. *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*..... 317
 3. **CONTEMPT—CIVIL CONTEMPT—MEASURE OF DAMAGES.** The measure of damages for civil contempt in operating a boom in violation of a judgment, whereby certain logs were prevented from entering relator's boom, is the price relator would have earned in booming the logs, less the reasonable cost of boomage; the profit being neither remote nor speculative. *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*..... 317

CONTRACTORS:

- Bonds on public work, see **MUNICIPAL CORPORATIONS**, 5, 6.
- Subject and title of act requiring bonds from on public work, see **STATUTES**, 3, 4.

CONTRACTS:

- See **BILLS AND NOTES**; **CORPORATIONS**, 5, 6; **MUNICIPAL CORPORATIONS**, 4; **SALES**.
- Impairing obligation, see **CONSTITUTIONAL LAW**, 3, 4.
- Constitutional guaranty of liberty to contract, see **CONSTITUTIONAL LAW**, 6.
- Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.

CONTRACTS—CONTINUED.

Leases, see LANDLORD AND TENANT.

Breach of logging contract, see LOGS AND LOGGING, 1.

Ground for mechanics' liens, see MECHANICS' LIENS, 1-3.

Specific performance, see SPECIFIC PERFORMANCE.

For water, see WATERS AND WATER COURSES, 1-3.

1. **CONTRACTS—IMPLIED CONTRACT.** The fact that a contractor took up the work of a defaulting subcontractor and made use of the remaining lumber sold and delivered to the subcontractor, does not imply a contract on the part of the contractor to pay the lumber company the price due for the lumber sold, no agreement with the subcontractor to that effect being shown, and there being no lien on the completed work for the material furnished. *Smith v. Hurley-Mason Co.* 683
2. **CONTRACTS—CONSIDERATION—SUFFICIENCY—MISCONCEPTION OF WILL.** Where a will gave plaintiff, during widowhood, one-half of the income of an estate, amounting to several hundred dollars a month, and made specific legacies to certain minors to be paid at majority out of the whole estate, without interest, there is no consideration for a contract between plaintiff and the executrix whereby the plaintiff was to receive but one hundred dollars a month out of the income, the balance to accumulate as a fund out of which to pay the legacies, the principal of the estate being ample to pay them, and her legacy not being subordinate; since the contract is neither a benefit to the plaintiff, nor a detriment to the executrix. *Stahl v. Schwartz* 25
3. **SAME.** The contract could not be considered an advantage to the plaintiff from the fact that, if she lived to her full expectation of life, and did not remarry, she would in the end receive a greater income from the estate by providing the accumulations with which to pay the legacies of the minors; it being a violation of public policy to enforce a condition of widowhood. *Stahl v. Schwartz*..... 25
4. **CONTRACTS—BUILDING CONTRACTS—PERFORMANCE OR BREACH—CERTIFICATE OF ARCHITECT.** An architect's certificate as to damages by reason of demurrage and extras is not conclusive where there was sufficient evidence to show that it was arbitrary and unreasonable. *Hillman v. Donaldson*..... 410

CONTRADICTION:

Of witness, see WITNESSES, 6; HOMICIDE, 1.

CONTRIBUTORY NEGLIGENCE:

Of person injured on street, see MUNICIPAL CORPORATIONS, 18, 19.

Of person struck by street car, see STREET RAILROADS, 3.

Of teamster in driving team over frogs and switches at crossing, see STREET RAILROADS, 4.

CONVERSION:

Of corporate stock by attorney, see **ATTORNEY AND CLIENT**.

Wrongful conversion of personal property in general, see **TROVER AND CONVERSION**.

CONVEYANCES:

See **CHATTEL MORTGAGES; MORTGAGES**.

In fraud of creditors, see **BANKRUPTCY**.

CORPORATIONS:

See **BENEFICIAL ASSOCIATIONS; MUNICIPAL CORPORATIONS**.

Conversion of stock by attorney, see **ATTORNEY AND CLIENT**.

Unlawful reduction of stock as conveyance in fraud of creditors, see **BANKRUPTCY**.

Acquisition of property by condemnation, see **EMINENT DOMAIN**.

Fraud in exchange of corporate stock, see **FRAUD**.

Action by trustee for sum paid on unlawful reduction of stock as one for relief on ground of fraud, see **LIMITATION OF ACTIONS, 1**.

Substituted service on nonresident stockholder as conferring jurisdiction of action as to title of stock, see **PROCESS**.

Law providing for commission to regulate rates and charges for public service corporations, see **STATUTES, 1**.

Subject and title of act providing for formation of corporations, see **STATUTES, 2**.

Fraudulent use of trade-name, see **TRADE-MARKS AND TRADE-NAMES**.

Conversion of corporate stock, see **TROVER AND CONVERSION, 2-4**.

1. **CORPORATIONS—CAPITAL STOCK—WRONGFUL ISSUANCE—LIABILITY OF COMPANY—OFFICERS—PERSONAL DEALINGS.** Where the president of a corporation, in order to secure his personal debt, turned over a certificate for corporate stock that he had wrongfully and fraudulently issued, the assignee has no claim against the corporation as an innocent holder, either to compel the transfer of the stock on the books of the company or for its value; the company not being liable for acts of its officers in dealing with stock for their personal benefit. *Whitfield v. Nonpareil Consolidated Copper Co.*..... 286
2. **CORPORATIONS—CAPITAL STOCK—TRANSFER—RECORDING—NECESSITY—WRONGFULLY ISSUED STOCK—RIGHTS OF INNOCENT PURCHASERS.** Under Rem. & Bal. Code, § 3693, providing that no transfer of corporate stock shall be valid except between the parties thereto until the stock shall have been entered on the books of the company, a certificate for stock fair on its face, but wrongfully and fraudulently issued by officers of the corporation, is not valid or binding on the corporation in the hands of an innocent purchaser until it has been entered on the books of the company, the statute being for the protection of the company and the transfer of the stock being ineffectual until registered. *Whitfield v. Nonpareil Consolidated Copper Co.* 286

CORPORATIONS—CONTINUED.

3. CORPORATIONS—CAPITAL STOCK—ACTIONS—CANCELLATION OF STOCK—PARTIES—INNOCENT HOLDERS. Under Rem. & Bal. Code, § 3693, making registration on the books of the company essential to a valid transfer of corporate stock except as between the parties, a purchaser of stock who allows several months to lapse before asserting any right to have the stock transferred is bound by a judgment, rendered in an action promptly brought by the corporation against the record owners of the stock, cancelling the same as fraudulently issued. *Whitfield v. Nonpareil Consolidated Copper Co.*..... 286
4. CORPORATIONS—STOCK—SITUS OF DOMESTIC STOCK IN POSSESSION OF NONRESIDENT—ACTIONS—VENUE—JURISDICTION. The claimant of corporate stock is entitled to bring an action to recover the same at the place where the company is incorporated, notwithstanding the certificates are in the possession of a nonresident. *Gamble v. Dawson* 72
5. CORPORATIONS — CONTRACTS — OFFICERS AND AGENTS — AUTHORITY. Where the superintendent of a corporation in charge of its business and of a building in which it repaired its taxicabs, had general power to employ and discharge men, a written contract whereby he employed plaintiff to do all the company's trimming and painting for one year, and leased a part of the second story of the building to plaintiff as a shop, is within the apparent scope of his authority and binding on the corporation, so far as the employment of the plaintiff is concerned, although the superintendent's actual authority was limited to verbal employment of men from day to day. *Slocum v. Seattle Taxicab Co.*..... 220
6. CORPORATIONS — REPRESENTATION — CONTRACTS — STOCKHOLDERS—RATIFICATION BY CORPORATION. Where, in consideration of 98 per cent of the stock of an irrigation company, the purchaser entered into an agreement to furnish water for specified tracts of land, and agreed to execute a water deed therefor as soon as he was made president of the corporation, the company ratifies the contract by furnishing water and receiving payments therefor under the contract. *Ulrich v. Pateros Water Ditch Co.*..... 328
7. CORPORATIONS — ACTIONS — CONDITIONS PRECEDENT — PAYMENT OF LICENSE—PROOF. Rem. & Bal. Code, § 3715, providing that the certificate of the secretary of state shall be *prima facie* evidence of the payment of annual license fees, made a condition precedent to an action by a corporation, does not make the certificate the only competent proof, and the payment may be established by the evidence of the officer making the same. *Miller and Sons v. Simmons*..... 294
8. CORPORATIONS—ACTIONS—VENUE—PRESUMPTION — DOING BUSINESS IN COUNTY. Under the statutes authorizing a corporation to be sued in any county where it transacts or transacted business at the time

CORPORATIONS—CONTINUED.

the cause arose, it will be presumed that the corporation did business in a county where it was sued, if there is nothing to the contrary in the record; and a default judgment may be taken against a corporation on a bond executed in the county in which the suit was brought; as that would be the transaction of business in that county, within the meaning of the statute. *Hayworth v. McDonald* 496

9. CORPORATIONS—LICENSE FEES — FAILURE TO PAY — EFFECT — REINSTATEMENT—STATUTES—CONSTRUCTION. Rem. & Bal. Code, §§ 3715a and 3715b, having provided that a corporation whose name has been stricken from the records for failure to pay its annual license fee might apply, at any time within six months, for reinstatement upon paying all fees and a penalty of \$25, the amendment thereof by Laws 1911, p. 135, by changing the time within which the application could be made from six months to "any time after its name has been stricken," and increasing the penalty to \$100, was intended to render inoperative Rem. & Bal. Code, § 3715d, providing that a corporation failing to make application for reinstatement within six months shall be thereby dissolved; since the acts are purely revenue measures, and the intent of the amendment was to permit reinstatement upon the conditions prescribed at any time, thereby increasing the revenues of the state. *State ex rel. Preston Mill Co. v. Howell*.. 377
10. SAME—CORPORATE FRANCHISES—FORFEITURE. Such act does not violate Const., art. 12, § 3, prohibiting the legislature from remitting the forfeiture of any corporate franchise or charter, the striking of delinquent names for failure to pay license fees not being the forfeiture of a franchise or charter within the meaning of the constitution. *State ex rel. Preston Mill Co. v. Howell*..... 377
11. CORPORATIONS—INSOLVENCY—PREFERENCE—EVIDENCE—SUFFICIENCY. Findings that a corporation, which was adjudged insolvent about a year after giving a mortgage for \$8,375, to secure an antecedent debt to a local bank, was not insolvent at that time, and that the mortgage was not an unlawful preference, are sustained where it appears that it was engaged in the retail meat business, that its total liabilities at that time did not exceed \$15,000 and its assets were valued by various witnesses at from \$15,000 to \$22,000, none of its creditors had manifested an intent to enforce collections by legal proceedings, it was paying its obligations in due course, and did about \$22,000 worth of business before it was closed up, and the mortgage covered only about one-half in value of its entire property. *Hadley v. Bank of Ellensburg*..... 680

CORROBORATION:

Of accomplices, see CRIMINAL LAW, 5; INCEST.
Of female in prosecution for rape, see RAPE.

COSTS:

Review of issue as to costs only, see **APPEAL AND ERROR**, 3.

Attorney's fees in divorce case, see **DIVORCE**, 2, 3, 8.

1. **COSTS—WITNESS FEES.** Under Rem. & Bal. Code, § 482, witness fees may be taxed for witnesses who were not subpoenaed or called, where they were in attendance at the trial, but not used because the course of the trial made their use unnecessary. *Hofstetter v. Sound Trustee Co.*..... 537

CO-TENANCY:

See **TENANCY IN COMMON**.

COUNTIES:

Establishment of highways, see **HIGHWAYS**.

1. **COUNTIES—CLAIMS—PRESENTATION—ON BEHALF OF MINORS.** A presentation of a claim by a widow for herself and minor children for the death of her husband through the fall of a county bridge, is a sufficient presentation on behalf of the children, under Rem. & Bal. Code, § 3909, providing in general terms that an action may be brought against the county after a claim has been presented and disallowed, without specifying who shall present the claim; especially in view of Rem. & Bal. Code, § 5932, giving such parent control of the children and their estate. *Frasier v. Cowlitz County*. 312
2. **COUNTIES — CLAIMS — VERIFICATION — FORM.** Under Rem. & Bal. Code, § 8354, requiring claims against a county to be sworn to before an officer having a seal, and that the bureau of inspection and supervision of public offices shall prescribe the form of affidavits, a claim verified before a notary public using his seal cannot be objected to as not in the form prescribed by the bureau, where it is not made to appear that the bureau had prescribed any form when the affidavit was made. *Frasier v. Cowlitz County*..... 312

COURTS:

Review of decisions, see **APPEAL AND ERROR**.

Contempt of court, see **CONTEMPT**.

Condemnation proceedings, see **EMINENT DOMAIN**.

Question for court, see **FRAUDS, STATUTE OF**, 2; **INDICTMENT AND INFORMATION**, 5.

Review of discretion in fixing assessment district, see **MUNICIPAL CORPORATIONS**, 7, 8.

Inquiry into motive of city council in vacating street, see **MUNICIPAL CORPORATIONS**, 15.

Bringing in new parties, see **PARTIES**.

Prohibition to inferior courts, see **PROHIBITION**.

Power to require attendance of witness, see **WITNESSES**, 4.

CREDIBILITY:

Of accomplice as witness, see **CRIMINAL LAW**, 5.

CREDITORS:

See **BANKRUPTCY**.

CRIMINAL LAW:

See **ABORTION**; **BRIBERY**; **EXTORTION**; **FALSE PRETENSES**; **HOMICIDE**; **INCEST**; **RAPE**; **ROBBERY**.

False registration by voter, see **ELECTIONS**.

Indictment, information, or complaint, see **INDICTMENT AND INFORMATION**.

Contributing to delinquency of child, see **INFANTS**.

Violation of liquor laws, see **INTOXICATING LIQUORS**.

Examination and impeachment of witness, see **WITNESSES**, 5, 6.

1. **CRIMINAL LAW — EVIDENCE — OTHER CRIMES—INTENT—EVIDENCE—ADMISSIBILITY.** In a prosecution of a chief of police for accepting bribes under a conspiracy with two others to conduct two certain houses of prostitution in violation of law, evidence that the defendant had sent the proprietors of other houses to the conspirators, and endeavored to interest them in the conduct of other houses, and that the defendant had interfered with the running of other houses not conducted by the conspirators, is admissible as tending to show the corrupt relations of the parties and guilty intent and at least slightly probative of the conspiracy. *State v. Wappenstein*..... 502
2. **CRIMINAL LAW—EVIDENCE—DECLARATIONS—CONVERSATIONS IN ABSENCE OF DEFENDANT—HEARSAY—CONSPIRACY.** Under an indictment charging the defendant with having solicited and accepted bribes from two others under an agreement, understanding and promise to allow them to conduct houses of prostitution in violation of law, evidence of a conversation between the two in pursuance of the design, when the defendant was not present, is not objectionable as hearsay, where in connection with evidence of what took place in defendant's presence, it tends to establish the unlawful conspiracy, combination or agreement alleged in the indictment, and there was already sufficient evidence proper to go to the jury tending to establish the conspiracy. *State v. Wappenstein*..... 502
3. **SAME.** Such evidence was not inadmissible because of no prior consummated corrupt agreement or conspiracy, since it is immaterial at what time any one entered into the conspiracy, all being deemed parties to every act done in furtherance of it. *State v. Wappenstein* 502
4. **SAME—EVIDENCE OF CONSPIRACY—SUFFICIENCY.** In a prosecution of a chief of police, there is sufficient *prima facie* proof of the fact of a conspiracy between him and two others, for the conducting of

CRIMINAL LAW—CONTINUED.

houses of prostitution in violation of law, to permit the introduction of evidence of the acts and declarations of the two when the defendant was not present, where it appears that the chief, just prior to taking office, had suggested to one of them that it would be the policy to open up such places, and that "all of us" could make some money thereby, and expressed a desire to meet the other conspirator and a meeting between them was arranged, and that some weeks prior thereto the two had agreed to rent such houses in case the city election resulted as it had. *State v. Wappenstein*..... 502

5. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CREDIBILITY—CORROBORATION—NECESSITY. The fact that witnesses are accomplices goes only to their credibility, and a conviction may be sustained upon their uncorroborated testimony. *State v. Wappenstein*..... 502
6. SAME — INTIMIDATION OF WITNESS — INDUCEMENTS. A conviction upon the testimony of accomplices cannot be objected to as secured by threats and intimidation of the witnesses or improper inducements held out to them, where it merely appears that the state had knowledge of other offenses committed by the witnesses, who hoped to better their position by telling all they knew, and were simply advised that, under the constitution, their evidence could not be used against them in any proceeding except for perjury in giving the evidence. *State v. Wappenstein*..... 502
7. CRIMINAL LAW — "ACCOMPLICES" — CONSPIRACY AS ELEMENT OF OTHER CRIME—PRINCIPALS AND ACCESSORIES—STATUTES. Where a chief of police was charged with soliciting and accepting bribes from two others under an agreement to permit them to conduct houses of prostitution in violation of law, the crime charged was that of accepting bribes, and not a conspiracy, and although proof of conspiracy was necessary as an element of the offense, it was not the offense charged; hence the conspirators were not accomplices, the offense of giving and offering a bribe being a distinct and separate offense from soliciting and accepting a bribe, under Rem. & Bal. Code, §§ 2320, 2321; and this, notwithstanding the provision of Id., § 2007, abolishing the distinction between principals and accessories, and § 2260 defining principals as all participants, as the sections are general and have no application to acts expressly designated as primary crimes in themselves. *State v. Wappenstein*. 502
8. CRIMINAL LAW — INDICTMENT — INDORSEMENT OF NAMES OF WITNESSES—NECESSITY—STATUTES—CONSTRUCTION. The accused is not a "witness" within Rem. & Bal. Code, §§ 2043 and 2099, requiring the names of witnesses examined before the grand jury to be indorsed on the indictment, where the accused, learning of the investigation, was permitted to make a voluntary statement before the grand jury, but the indictment was not based thereon, and no vote was taken after the statement was made. *State v. Kulbe*..... 21

CRIMINAL LAW—CONTINUED.

9. CRIMINAL LAW—EVIDENCE—ORDER OF PROOF—CONSPIRACY AS PART OF OFFENSE—ADMISSIBILITY. An objection that before the acts and declarations of the conspirators can be admitted in further proof of the conspiracy, there must be prior evidence *aliunde*, establishing *prima facie* the existence of the conspiracy, is one that goes only to the order of proof, which rests largely in the discretion of the trial court. *State v. Wappenstein*..... 502
10. CRIMINAL LAW—TRIAL—REOPENING CASE. It is within the discretion of the trial court in a criminal case to reopen the case to allow the state to introduce further evidence. *State v. Hornaday*..... 660
11. CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE—EXAMINATION OF WITNESS. Where, in a prosecution for soliciting and accepting a bribe, under a conspiracy with two others to conduct houses of prostitution in violation of law, a witness who was the keeper of such a house had covertly insinuated that something said to him by the defendant had led him to go to one of the conspirators with money to bribe the defendant, and the witness was not frank in stating what had been said, it is not prejudicial misconduct on the part of the court to insinuate that the witness was not answering truthfully and admonish him to state the truth and what defendant had said, and to assume that something was said to him about going down and offering money, and that if the defendant had not said anything, to let the witness say so, where the purpose of the court was clearly either to kill the insinuation which the witness had made against the defendant or bring out the ground on which it was made; the result being that the witness denied that the defendant had said anything about money, and testified that he had made an offer of money to a conspirator on his own initiative which offer was refused; since it was to the advantage of the defendant. *State v. Wappenstein* 502
12. CRIMINAL LAW—TRIAL—MISCONDUCT OF JUDGE. It is not prejudicial misconduct on the part of the court to call a deliberating jury at about 9 o'clock Saturday evening and to intimate that he might be required to keep them over Sunday if they could not agree by midnight, where the jury returned a verdict more than two hours before midnight. *State v. Baker*..... 595
13. CRIMINAL LAW—TRIAL—MISCONDUCT OF COUNSEL—FAIR TRIAL. Upon a prosecution for abortion, the defendant is deprived of his right to a fair trial, where evidence was received that he had repeatedly ravished the prosecuting witness and compelled her to commit sodomy with him, and his motion to strike the same was granted only upon exacting an admission that the prosecuting witness was pregnant by him. *State v. Pryor*..... 216
14. CRIMINAL LAW—MISCONDUCT OF COUNSEL. Where, in a prosecution for abortion, improper evidence of acts of sodomy with the

CRIMINAL LAW—CONTINUED.

- prosecuting witness has been stricken, it is highly improper for the state to cross-examine the defendant concerning the acts of sodomy, and it cannot be said that the prejudicial effect thereof and of the evidence is cured by sustaining objections thereto and instructing the jury to disregard the evidence. *State v. Pryor*..... 216
15. CRIMINAL LAW — TRIAL — INSTRUCTIONS — REASONABLE DOUBT. An isolated clause in an instruction to the effect that no reasonable doubt exists if the jury is "morally certain" about the matter is not prejudicial error, when the instructions as a whole clearly instructed as to the burden of proof, the presumption of innocence, the distinction between the *quantum* of proof in civil and criminal cases, and declared that a reasonable doubt is one that must arise from the evidence. *State v. Wappenstein*..... 502
16. SAME—DISCREPANCIES IN TESTIMONY — CAUTIONARY INSTRUCTIONS. Cautionary instructions against being led afield by discrepancies and inconsistency in the evidence which have no bearing upon the main issue in the case are not erroneous as eliminating disputed and material facts, where the testimony was very voluminous and there was danger of the jury becoming hopelessly involved in a maze of collateral issues, and no fact was taken from the jury, the jury being told that they were the exclusive judges of the evidence and of its weight and the credibility of the witnesses. *State v. Wappenstein* 502
17. CRIMINAL LAW—TRIAL—MISCONDUCT OF JURY. In a prosecution for violation of the local option law, it is not misconduct on the part of the jury that, on an issue as to the intoxicating character of the liquors, the jurors smelled and tasted the contents of samples of the liquor, received in evidence as exhibits, and taken into the jury room without objection. *State v. Baker*..... 595
18. CRIMINAL LAW—APPEAL—REVIEW—OBJECTIONS. Error cannot be predicated upon failure to require the state to elect between the acts charged, where no request for an election was made below. *State v. Hornaday* 660
19. CRIMINAL LAW—APPEAL — INSTRUCTIONS — REQUESTS — HARMLESS ERROR. Error cannot be predicated upon an instruction as to the effect of a prior act of intercourse upon the credibility of the prosecuting witness in that it did not state the effect upon the girl's consent to the act complained of, where no request was made therefor, and the instruction given was favorable to the defendant. *State v. Aton* 485

CROSS-EXAMINATION:

See WITNESSES, 5.

Of witness at criminal trial, see CRIMINAL LAW, 14.

CROSSINGS:

Accidents at street crossings, see **STREET RAILROADS**.

CRUELTY:

Ground for divorce, see **DIVORCE**, 1.

CUSTODY:

Of child, see **DIVORCE**, 6, 9.

DAMAGES:

See **LIBEL AND SLANDER**, 2; **MALICIOUS PROSECUTION**, 2, 4.

Evidence in action for damages to passenger in collision, see **CARRIERS**, 1.

For civil contempt for violation of judgment, see **CONTEMPT**, 3.

For wrongful death, see **DEATH**.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 3, 4.

Evidence of mental shock in action for, see **EVIDENCE**, 2.

Double damages for embezzlement of assets of estate, see **EXECUTORS AND ADMINISTRATORS**, 1.

Taking land for highway, see **HIGHWAYS**, 2.

For breach of lease by landlord, see **LANDLORD AND TENANT**, 5.

Application of statute of limitations to action for, see **LIMITATION OF ACTIONS**, 2.

For breach of logging contract, see **LOGS AND LOGGING**, 1.

For vacation of street, see **MUNICIPAL CORPORATIONS**, 13, 14.

For conversion of property, see **TROVER AND CONVERSION**, 2-4.

For breach of contract to furnish water for irrigation, see **WATERS AND WATER COURSES**, 3.

From flooding by break in irrigation canal, see **WATERS AND WATER COURSES**, 4.

1. **DAMAGES—PERSONAL INJURIES—HUMILIATION—INSTRUCTIONS.** In a personal injury case, an instruction authorizing the jury to consider injuries which render the plaintiff an object of pity or ridicule should not be given unless the injury is such as to shock the senses of fair-minded men or invite the unfeeling to ridicule. *Lynch v. Northern Pac. R. Co.*..... 113
2. **DAMAGES—PERSONAL INJURIES—FUTURE PAIN—INSTRUCTIONS.** In an action for personal injuries, it is not error to instruct that the jury may take into consideration any future pain that he will suffer in consequence of his injuries, instead of such future pain as he might reasonably be expected to suffer. *Anderson v. Hurley-Mason Co.* 342
3. **DAMAGES—PERSONAL INJURIES—MEDICAL EXPENSES—INSTRUCTIONS.** In an action for personal injuries in which there was no evidence of

DAMAGES—CONTINUED.

expense for medical services, it is not prejudicial error to instruct that the jury may include such reasonable sum as the evidence shows he has been or may hereafter be called upon to expend for physicians and surgeons. *Anderson v. Hurley-Mason Co.*..... 342

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$7,000 for personal injuries resulting in traumatic neurasthenia reduced by the trial judge to \$5,000, is not excessive where the condition is serious and probably permanent. *Taylor v. Spokane, Portland & Seattle R. Co.* 96
5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$23,895, reduced by the trial judge to \$14,000, for injuries sustained by a locomotive engineer in a wreck, will not be disturbed on appeal as excessive, where he sustained a Pott's fracture of the ankle and a fracture of the skull and a cut across the nose and cheek, resulting in impaired sight and hearing, in traumatic neurasthenia, permanent lameness, weakness and loss of health, there being no way to measure his earning capacity with exactness. *Lynch v. Northern Pac. R. Co.*..... 113
6. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,410, reduced by the trial court to \$910, for a severe and painful knife cut in the thigh, received in an assault, will not be disturbed on appeal as excessive. *Fronhofer v. Inland Navigation Co.*..... 171
7. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$15,000 for injuries sustained by a man 26 years of age, in good health, is not excessive, where he suffered partial paralysis, has undergone two surgical operations, part of his skull was removed, he has been months in a hospital, expending \$2,000 in hospital and doctor's bills, and his injuries are permanent. *Richardson v. Spokane* 621
8. DAMAGES — PERSONAL INJURIES — INSTRUCTIONS — EXPECTANCY OF LIFE. It is not error to instruct the jury on the measure of damages for personal injuries, to consider the plaintiff's "expectancy of life," following immediately a reference to his previous condition of health and earning capacity, and followed immediately by reference to the permanency of the injury, where recovery for future pain and suffering was limited to that resulting from the injury. *Richardson v. Spokane* 621
9. DAMAGES—PERSONAL INJURIES—MORTALITY TABLES—EVIDENCE—ADMISSIBILITY. In an action for permanent personal injuries, mortality tables are admissible in evidence in connection with the plaintiff's prior state of health, and the probable permanency of his injuries in determining loss of earning capacity. *Richardson v. Spokane* 621

DEATH:

Presenting claims against county for, see **COUNTIES**.

1. **DEATH—ACTIONS—DAMAGES—AFTER MAJORITY OF HEIR—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 183, providing that in actions for wrongful death on behalf of the widow or children, the jury may give such damages as under all the circumstances of the case may to them seem just, a minor son is entitled to recover for the death of his father such pecuniary loss as the evidence showed he would sustain after his majority; especially in view of the amendment of 1909, adding to the beneficiaries of the statute, parents, sisters and "minor" brothers dependent upon the deceased for support; and the evidence justifies an instruction to that effect where the son was normally defective and the father was not an immoral or improvident man or in bad health. *Rochester v. Seattle, Renton & Southern R. Co.*..... 545

DEBT:

Promise to answer for debt of another, see **FRAUDS, STATUTE OF**, 1-4.
Form and effect of judgment against husband for community debt, see **HUSBAND AND WIFE**, 4.

Incurred in excess of constitutional limit, see **MUNICIPAL CORPORATIONS**, 20, 21.

DECEDENTS:

Evidence in action against deceased on open account, see **EVIDENCE**, 1.

Estates, see **EXECUTORS AND ADMINISTRATORS**.

Evidence of transactions with deceased, see **WITNESSES**, 1, 2.

DECISION:

Decisions reviewable, see **APPEAL AND ERROR**, 1, 2.

On appeal as law of case, see **APPEAL AND ERROR**, 32.

DECLARATIONS:

As evidence in criminal prosecutions, see **CRIMINAL LAW**, 2, 4.

Self-serving declarations, see **HOMICIDE**, 5.

DEDICATION:

Claiming street by dedication and prescription, see **MUNICIPAL CORPORATIONS**, 10.

1. **DEDICATION—BY ESTOPPEL AND USER—EVIDENCE—SUFFICIENCY—IMPLIED ACCEPTANCE.** A dedication of a city street by estoppel and user is shown where it appears that the owner removed his fences from a strip thirty feet wide, stating that he was throwing it open to the public, in 1889, and deeded the same to the city in 1892, a sidewalk was constructed thereon, the street used by the public for twenty years, and referred to in partition deeds of the heirs as

DEDICATION—CONTINUED.

Galer street, and used as a boundary line; the long continued use by the public implying an acceptance by the city, although the deed was lost and the street was not worked. *Seattle v. Hinckley*... 273

DEEDS:

Void administrator's deed as color of title, see **ADVERSE POSSESSION**, 2.

DEFAULT:

Judgment by, see **JUDGMENT**, 1-4.

DEGREES:

Instructing as to degrees of crime, see **HOMICIDE**, 6.

DELAY:

Estoppel of vendor to assert delay in demanding deed or taking possession of land, see **SPECIFIC PERFORMANCE**.

DELIVERY:

Of gift, see **GIFTS**, 1.

Of material to contractor on public work, see **MUNICIPAL CORPORATIONS**, 5.

DEMURRER:

In pleading, see **PLEADING**, 2.

DESCRIPTION:

Of injury in claim filed with city, see **MUNICIPAL CORPORATIONS**, 24.

DILIGENCE:

In preparing defense to action on policy, see **INSURANCE**.

DIRECTING VERDICT:

In civil actions, see **TRIAL**, 3.

DISCRETION:

Abuse of in fixing limits of assessment district, see **MUNICIPAL CORPORATIONS**, 7-9.

DISCRETION OF COURT:

Order of proof, see **CRIMINAL LAW**, 9.

Reopening case for further evidence, see **CRIMINAL LAW**, 10.

Allowance of attorney's fees, see **DIVORCE**, 3.

Award of property on divorce, see **DIVORCE**, 7.

To grant new trial, see **NEW TRIAL**.

Amendment to conform to proof, see **PLEADING**, 3.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 3, 7.

DISSOLUTION:

Of corporation for failure to pay license fee, see **CORPORATIONS**, 9.

DISTRICT AND PROSECUTING ATTORNEYS:

Advice of prosecuting attorney justifying prosecution, see **MALICIOUS PROSECUTION**, 1.

DIVORCE:

1. **DIVORCE—GROUNDS—CRUELTY—EVIDENCE—SUFFICIENCY.** A divorce on the ground of cruelty on the part of the wife is justified where it appears that she refused to cohabit with the plaintiff, was guilty of fraud and deceit in securing a marriage without intent to cohabit, and brought an unfounded charge of adultery against him. *Gibson* Mortality tables as evidence, see **DAMAGES**, 9.
2. **DIVORCE—ALLOWANCE—ATTORNEY'S FEES.** On motion for a new trial in a divorce case, the court has jurisdiction to reopen the case and modify the decree by requiring payment of costs and a further allowance for attorney's fees. *Gibson v. Gibson*..... 474
3. **SAME—ATTORNEY'S FEES.** The allowance of attorney's fees to the wife in a divorce case is within the sound discretion of the trial court; and no abuse is shown by the allowance of \$500 additional, upon denying a motion for a new trial, the preliminary allowance having been \$250. *Gibson v. Gibson*..... 474
4. **DIVORCE—ALIMONY—ENFORCEMENT—CONTEMPT PROCEEDING—TITLE—PARTIES.** A proceeding to enforce a decree for alimony by means of notice and commitment for contempt in case of default, is not an independent contempt proceeding to be prosecuted in the name of the state, but is properly entitled in the divorce case. *McGill v. McGill* 303
5. **SAME—REMARRIAGE OF PLAINTIFF—PARTIES.** The remarriage of the wife does not prevent the enforcement of a decree for alimony. *McGill v. McGill*..... 303
6. **SAME—SUPPORT OF CHILD—REMARRIAGE OF PLAINTIFF—EFFECT.** The fact that, on remarriage, the wife's husband assumed the custody and support of a child, is no answer to contempt proceedings to enforce the payment of alimony awarded to the wife for such support. *McGill v. McGill*..... 303
7. **DIVORCE—DIVISION OF PROPERTY.** It is discretionary in granting a divorce, for the trial court to award all of the property to the husband, subject to the payment of reasonable alimony. *Brozna v. Brozna* 687
8. **DIVORCE—DIVISION OF PROPERTY—SUIT MONEY—ALLOWANCES—SUFFICIENCY.** Upon granting a divorce on the ground of cruelty on the part of the wife, who secured the marriage by deceit, allowances to the wife of \$600 alimony, \$125 suit money, and \$750 attorney's fees

DIVORCE—CONTINUED.

and costs, is an ample provision, where there was no community property and the husband, a retired farmer in comfortable circumstances, had already given her \$1,000. *Gibson v. Gibson*..... 474

9. **DIVORCE—CUSTODY OF CHILDREN.** Where there is doubt as to the character of the wife, the court may award the custody of the children to her for a limited period only, subject to future revision. *Broгна v. Broгна*..... 687

DOCUMENTS:

As evidence in civil actions, see **EVIDENCE**, 3-5.

DOMICILE:

1. **DOMICILE — CHANGE — ABANDONMENT — INTENT—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to show abandonment of domicile in this state, established here for many years, where the deceased returned to his native state owing to ill health, and remained there 18 months until he died, but intending to return to this state if he recovered his health, as shown by his letters and the fact that he did not sell his home or furniture, and other circumstances, although he bought a small place in his native state. *Gamble v. Dawson* 72

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 6.

DUPLICITY:

In indictment, see **INDICTMENT AND INFORMATION**, 2, 3.

ELECTION:

Between acts charged, see **CRIMINAL LAW**, 18.

ELECTIONS:

Validation of indebtedness in excess of limit, see **MUNICIPAL CORPORATIONS**, 21.

1. **ELECTIONS — OFFENSES — FALSE REGISTRATION — STATUTES — CONSTRUCTION.** One who procures a voter to register and incorrectly state his place of residence, is not guilty of false registration, when the voter did not register in the wrong precinct, under Rem. & Bal. Code, § 4768, defining false registration as the taking of a false oath, falsely personating another and procuring registration of the person as personated, misrepresenting his name or causing any name to be registered "otherwise than in the manner provided by the act;" in view of the fact that the matter of residence is not included in the oath nor among the acts specifically enumerated as constituting the criminal offense. *State v. Cohen*..... 618

ELOIGNMENT:

Of logs and timber, see **LOGS AND LOGGING**, 4, 6.

EMBEZZLEMENT:

Of assets of estate, see **EXECUTORS AND ADMINISTRATORS**, 1.

EMINENT DOMAIN:

Review of award in condemnation, see **APPEAL AND ERROR**, 14.

Proceedings to fix damages for land taken by county for road, see **HIGHWAYS**, 2.

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 7, 11, 12.

1. **EMINENT DOMAIN—IRRIGATION — “CORPORATE PURPOSES” — RESERVOIRS.** Under Rem. & Bal. Code, § 9510, providing that corporations organized for the purpose of erecting and maintaining flumes or aqueducts to convey water for . . . irrigation . . . shall have the same right to appropriate lands for necessary corporate purposes as other corporations and to take any water not otherwise legally appropriated, an irrigation company may condemn land for a reservoir site, that being a “necessary corporate purpose” within the act, where it is necessary to store water in order to accomplish irrigation. *State ex rel. Golden Valley Irrigation Co. v. Superior Court* 556
2. **EMINENT DOMAIN—PUBLIC USE—IRRIGATION.** The use of waters for irrigation is a public use, under Const., art. 21, § 1, providing that “the use of the waters of this state for irrigation . . . shall be deemed a public use.” *State ex rel. Golden Valley Irrigation Co. v. Superior Court*. 556
3. **EMINENT DOMAIN — DAMAGES — EVIDENCE—ADMISSIBILITY.** Upon condemnation of twenty-two cubic feet of water to be taken from a creek thirteen miles above defendant’s mill site, evidence is admissible to show that it would not result in a loss of that much water at the point of defendant’s property; inasmuch as the ordinance to condemn the same did not show an intent to condemn water all of which belonged to defendant. *Walla Walla v. Dement Brothers Co.* 186
4. **EMINENT DOMAIN—APPEAL—RIGHT TO APPEAL—WAIVER—PAYMENT OF AWARD—CESSATION OF CONTROVERSY.** A city cannot, after paying an award in condemnation proceedings into court, appeal therefrom, as the controversy has ceased, in view of Rem. & Bal. Code, § 7783, providing that an award of damages in condemnation proceedings shall be final unless appealed from, making payment of the amount into court an indispensable condition of possession of the property, and providing that after payment, the city shall be liable to the owners for any further compensation which may be finally awarded to the parties appealing, and that acceptance of the sum awarded shall waive the right to appeal, whereupon final judgment may be rendered as in other cases, and *Id.*, § 7784, providing that, upon payment of the award, title shall vest in the city,

EMINENT DOMAIN—CONTINUED.

and Const., art. 1, § 16, prohibiting the taking of private property until compensation therefor in money shall be first ascertained and paid into court. *Spokane v. Cowles*..... 539

EMPLOYEES:

See MASTER AND SERVANT.

EQUITY:

See SPECIFIC PERFORMANCE.

Equitable estoppel, see ESTOPPEL.

Relief against violation of eight-hour law, see INJUNCTION.

Equitable substitution of mortgage, see MORTGAGES, 2, 4.

Effect of prayer for equitable relief in action at law, see PLEADING, 1.

Equitable cross-complaint in legal action, see TRIAL, 1.

1. EQUITY—RELIEF FROM MISTAKE—MISCONSTRUCTION OF WILL—MISTAKE OF LAW OR FACT. Equity will grant relief from a mistake as a mistake of fact, where parties erroneously construe a will as requiring legacies to be paid out of the income, and contract with reference to such erroneous construction; the test involving mutual mistake of fact being whether the contract would have been entered into had there been no mistake. *Stahl v. Schwartz*..... 25

ERASURES:

Effect of erasures in account books, see EVIDENCE, 4.

ESTABLISHMENT:

Of boundary, see BOUNDARIES.

Of highways, see HIGHWAYS.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Tenancy in common, see TENANCY IN COMMON.

ESTOPPEL:

Dedication by, see DEDICATION.

By judgment, see JUDGMENT, 5-10.

Of city to question right to office, see MUNICIPAL CORPORATIONS, 2.

Of city to claim street by dedication, see MUNICIPAL CORPORATIONS, 10.

To vacate street, see MUNICIPAL CORPORATIONS, 11.

Of vendor, see SPECIFIC PERFORMANCE.

1. ESTOPPEL—IN PAIS—PREJUDICE TO RIGHTS OF OTHER PARTY. Acceptance of money due plaintiff under a will, pursuant to a contract made under a misconstruction of the will and mutual mistake of fact, will not estop her from recovering the balance due on a proper

ESTOPPEL—CONTINUED.

construction of the will, where no injury results to the remainder of the estate, and the contract in no way limited or interfered with the right and duty of the executrix to manage the estate. *Stahl v. Schwartz* 25

EVIDENCE:

See GIFTS; HOMICIDE, 1-5; MALICIOUS PROSECUTION; MONEY LENT; ROBBERY; SPECIFIC PERFORMANCE; TROVER AND CONVERSION; WITNESSES.

Of other crimes, see ABORTION.

Objections for purpose of review, see APPEAL AND ERROR, 5.

Review, harmless error in rulings on, see APPEAL AND ERROR, 25-28.

Of conversion by attorney and trustee of corporate stock, see ATTORNEY AND CLIENT.

Location of boundary, see BOUNDARIES, 2, 3.

To sustain conviction of accepting bribe, see BRIBERY.

For personal injuries to passengers, see CARRIERS.

In prosecution for violation of eight-hour-day law, see CONSTITUTIONAL LAW, 2.

Proof of payment by corporation of license fee, see CORPORATIONS, 7.

Of insolvency and unlawful preference by corporation, see CORPORATIONS, 11.

In criminal prosecutions, see CRIMINAL LAW, 1-6, 9, 10, 13, 14.

Mortality tables as evidence, see DAMAGES, 9.

To show dedication by estoppel and user, see DEDICATION.

In action for divorce, see DIVORCE, 1.

Intent to change domicile, see DOMICILE.

Condemnation proceedings, see EMINENT DOMAIN, 3.

Of fraud, sufficiency, see FRAUD.

Separate property of wife, see HUSBAND AND WIFE, 1.

Corroborating testimony of accomplice, see INCEST, 3.

Proof of elements of offense, see INDICTMENT AND INFORMATION, 1.

Of waiver of provisions in policy, see INSURANCE, 2.

For violation of liquor laws, see INTOXICATING LIQUORS, 3, 5, 6.

For injuries to servant in general, see MASTER AND SERVANT, 1, 2, 6.

Performance of building contract, see MECHANICS' LIENS, 3.

Delivery of material to contractor on public work, see MUNICIPAL CORPORATIONS, 5.

Contributory negligence of person struck by automobile, see MUNICIPAL CORPORATIONS, 18.

Insufficiency of ground for new trial, see NEW TRIAL, 1.

Admissions of partner as evidence against other, see PARTNERSHIP, 1.

Withdrawal of partner from firm, see PARTNERSHIP, 2.

Agency, see PRINCIPAL AND AGENT, 1.

Corroboration of prosecutrix, see RAPE.

Of warranty on sale of goods, see SALES, 5, 7.

EVIDENCE—CONTINUED.

To show dangerous condition of track, see **STREET RAILROADS**, 1.

Instructions as to preponderance of, see **TRIAL**, 2.

Negligence in attempting to repair irrigation canal, see **WATERS AND WATER COURSES**, 4.

1. **EVIDENCE — RELEVANCY — COLLATERAL MATTERS—ACTIONS AGAINST DECEASED—CIRCUMSTANTIAL EVIDENCE.** In an action on open account by a bookkeeper and timekeeper, employed by defendant's decedent on contract work, in which plaintiff seeks recovery for moneys advanced to the deceased in addition to wages, it is error to exclude evidence offered by the defendant to show that the contract was a profitable one on which there was a large sum due the deceased at the time of his death, as tending to show that deceased would not have borrowed money from plaintiff; circumstantial evidence being especially admissible in favor of the estate of a deceased person. *Robertson v. O'Neill*..... 121
2. **EVIDENCE—DAMAGES—MENTAL SHOCK—ADMISSIBILITY — RES GESTAE.** Upon an issue as to the amount of damages sustained in a railway collision by a passenger who was thrown to the floor and suffered traumatic neurasthenia, evidence of shock from the sight of mangled and bleeding passengers while plaintiff was being conveyed to the city in a street car, medical experts testifying that such sight might contribute to plaintiff's injuries, is admissible as a direct or proximate result of the accident and part of the *res gestae*, where it was only a repetition or continuation of what plaintiff had seen or experienced to a greater degree on the wrecked train. *Taylor v. Spokane, Portland & Seattle R. Co.*..... 96
3. **EVIDENCE—DOCUMENTARY EVIDENCE—ACCOUNT BOOKS.** In an action on open account by one employed by defendant's decedent as a timekeeper and bookkeeper, plaintiff's journal entries of the items charged at varying intervals, seemingly made in the usual course of business, are admissible in evidence, where the deceased frequently examined and checked the books, and slept in the office where they were kept during the times in question; and they are not rendered incompetent by the fact that some of the items were of money advanced by the plaintiff. *Robertson v. O'Neill*..... 121
4. **SAME — ACCOUNT BOOKS — ERASURES.** An objection to account books on account of erasures goes to the weight and not to the competency of the evidence. *Robertson v. O'Neill*..... 121
5. **EVIDENCE—DOCUMENTARY EVIDENCE—ACCOUNT BOOKS—ENTRIES.** A book of account kept by general contractors is admissible in evidence, where it appears that the items were entered from information and data acquired from blank slips filled out by their employees and turned in each week showing the time and kind of work done by each, and checked by the foreman, the foreman testified from personal knowledge to the correctness of the data, and the

EVIDENCE—CONTINUED.

- person making the entry in the book testified to the correctness of the original data and the record thereof in the book. *Lawn v. Prager* 568
6. **EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACTS—NOTES.** Parol evidence that a note made by one member of a partnership and another person was to be paid by the partnership instead of the makers is inadmissible as varying the terms of the writing. *Aurora Land Co. v. Keevan*..... 305
7. **EVIDENCE—TO VARY WRITING—BILL OF SALE—ORAL WARRANTY.** Where a bill of sale warrants only the title, evidence of an oral warranty of the good condition of the machine is inadmissible, as varying the terms of the writing. *Pacific Aviation Co. v. Philbrick* 414
8. **EVIDENCE—PAROL—VARYING LEASE.** Where a lease, complete in itself, requires the tenant to make any desired alterations, it cannot be varied by evidence of an oral contemporaneous agreement that the landlord should make certain alterations and improvements. *Rockwell v. Eiler's Music House*..... 478
9. **EVIDENCE—OPINION—EXPERTS—INTOXICATING LIQUORS.** An expert chemist may testify as to his analysis of beer, and state his opinion as to whether it was intoxicating. *State v. Baker*..... 595

EXAMINATION:

- Of witness, see **CRIMINAL LAW**, 11, 14.
- Of expert witnesses, see **EVIDENCE**, 9.
- Of witnesses in general, see **WITNESSES**.

EXCEPTIONS:

- Necessity for purpose of review, see **APPEAL AND ERROR**, 4, 6.

EXCESSIVE DAMAGES:

- See **DAMAGES**, 4-7.

EXECUTION:

- Of mortgage, see **MORTGAGES**, 1, 2.
1. **EXECUTION—SALE—PURCHASERS—BONA FIDE PURCHASERS.** An execution creditor purchasing at his own sale is not a *bona fide* purchaser and takes only the actual interest of the judgment debtor; so that, upon the equitable substitution, as between the parties, of an old mortgage, consideration for the release of which had failed through defects in the execution of a renewal mortgage by the judgment debtor, the lien of the old mortgage is restored taking its former priority over the lien of the judgment. *American Savings Bank & Trust Co. v. Helgesen*..... 572

EXECUTORS AND ADMINISTRATORS:

Possession under administrator's deed, see **ADVERSE POSSESSION**, 2.

Contract between legatee and executrix for payment under will, see **CONTRACTS**, 2, 3.

Administration of community estate, see **HUSBAND AND WIFE**, 2, 3.

1. **EXECUTORS AND ADMINISTRATORS—ACTIONS — ASSETS — EMBEZZLEMENT—DOUBLE DAMAGES—STATUTES.** One innocently coming into the possession of property under claim of ownership by an alleged gift from the deceased is not liable for double damages under Rem. & Bal. Code, § 1460, providing for double damages if any one shall, before the granting of letters of administration, embezzle or alienate any of the effects of the estate. *Jackson v. Lamar*..... 385
2. **EXECUTORS AND ADMINISTRATORS—ACTIONS — CLAIMS — PRESENTATION—MECHANICS' LIENS—FORECLOSURE.** Under Rem. & Bal. Code, § 1479, providing that no holder of any claim against an estate shall maintain an action thereon unless he shall have first presented a claim to the executor or administrator, the presentation of a claim is a condition precedent to an action to foreclose a mechanics' lien against property of the estate, for materials furnished to a contractor under a contract made with the deceased during his lifetime. *Crowe & Co. v. Adkinson Construction Co.*..... 420
3. **SAME — MECHANICS' LIENS — MATERIALS.** The necessity of presenting a claim is not affected by the fact that there is no privity between the materialman and the owner, the lien not depending on contract and being limited to the reasonable value of the services. *Crowe & Co. v. Adkinson Construction Co.*..... 420

EXEMPTIONS:

From taxation, see **TAXATION**, 1, 2.

EXPENSES:

Recovery of expense for medical services, see **DAMAGES**, 3.

Validity of indebtedness incurred for though in excess of constitutional limit, see **MUNICIPAL CORPORATIONS**, 20, 21.

EXPERT TESTIMONY:

In civil actions, see **EVIDENCE**, 9.

EXTORTION:

1. **EXTORTION—ELEMENTS OF OFFENSE—EXTORTION BY THREATS.** The defendants are guilty of extortion by threats, where they accused the prosecuting witness of adultery and demanded the payment of money as satisfaction, which he at first refused, although they later enforced their demands by violence. *State v. Barr*..... 87
2. **SAME—VALUE OF PROPERTY—CHECK WITHOUT CASH VALUE.** Under Rem. & Bal. Code, § 2610, defining extortion of money or property

EXTORTION—CONTINUED.

by threats or accusation of crime, and § 2303, providing that the word "property" shall include all instruments or writings completed and ready to be delivered by which any right is or purports to be evidenced or created, one may be guilty of extorting a check, although it had no actual cash value from the fact that it would not have been cashed; as the claim which might have been made thereon imported value. *State v. Barr*..... 87

FALSE IMPRISONMENT:

See MALICIOUS PROSECUTION.

FALSE PRETENSES:

1. **FALSE PRETENSES—ELEMENTS OF OFFENSE—EFFICIENT INDUCEMENT—INSTRUCTIONS—CONSISTENCY.** In a prosecution for obtaining money by false pretenses, it is not inconsistent or misleading to instruct that the false representations must have been the effective cause inducing the loss of the money and that it is sufficient if they were relied upon and in some measure induced the loss; since the false representations need not be the sole, if the efficient, inducement. *State v. Kulbe*..... 21

FEEES:

- Witness fees as costs, see COSTS.
- Of attorney in action for divorce, see DIVORCE, 2, 3, 8.

FELLOW SERVANTS:

See MASTER AND SERVANT, 3-5.

FILING:

- Statement of facts on appeal, see APPEAL AND ERROR, 10.
- Answer after default as constituting appearance, see JUDGMENT, 1.
- Logger's lien, see LOGS AND LOGGING, 3, 4.
- Claims for personal injuries, see MUNICIPAL CORPORATIONS, 22.

FINAL JUDGMENT:

Appealability, see APPEAL AND ERROR, 2.

FINDINGS:

- Necessity of exceptions for purpose of review, see APPEAL AND ERROR, 4, 6.
- Review on appeal, see APPEAL AND ERROR, 18-21.
- Special findings by jury, see TRIAL, 3.

FLOODS:

- Damages from flooding by break in irrigation canal, see WATERS AND WATER COURSES, 4.

FORECLOSURE:

- Of mortgage, see CHATTEL MORTGAGES; MORTGAGES, 3-6.
- Of logger's lien, see LOGS AND LOGGING, 6.
- Of lien, see MECHANICS' LIENS.
- Of mechanics' lien against property of estate, see MECHANICS' LIENS, 2, 3.
- Of tax certificate, see TAXATION, 2.

FORFEITURE:

- Of membership, see BENEFICIAL ASSOCIATIONS, 2.
- Of corporate franchise, see CORPORATIONS, 10.

FORMER ADJUDICATION:

- See JUDGMENT, 5-10.

FRANCHISES:

- Control of city franchise to telephone company as exercise of police power of state, see CONSTITUTIONAL LAW, 3, 4.
- Corporate franchises, see CORPORATIONS, 10.
- Grant by municipality, see MUNICIPAL CORPORATIONS, 16, 17.

FRAUD:

- See BILLS AND NOTES, 1.; FALSE PRETENSES; SALES, 1, 3.
- In reducing capital stock of corporation, see BANKRUPTCY.
- Corporate officers, see CORPORATIONS, 1-3.
- False registration by voter, see ELECTIONS.
- Limitation of action to vacate judgment for fraud, see JUDGMENT, 4.
- Bar of action for relief on ground of, see LIMITATION OF ACTIONS, 1.
- Unfair competition by fraudulent use of trade-name, see TRADE-MARKS AND TRADE-NAMES.

1. FRAUD—ACTIONABLE DECEIT—SALE OF CORPORATE STOCK—RESCISSION—EVIDENCE—SUFFICIENCY. In an exchange of the corporate stock of one corporation for that of another, fraudulent representations relate to matters of fact which may be relied upon rather than to opinions requiring investigation, and are actionable, where the amount of the personal and real property of the corporation, its profits, dividends, debts and outstanding contracts were misrepresented, nothing was delivered except the shares of stock, and there was no way to ascertain the truth except by inquiry, and statements of officers of the corporation were relied upon. *Breese v. Hunt* 398

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—ANSWERING FOR DEBT OF ANOTHER—INTEREST AS STOCKHOLDER. A promise by a promoter and principal stockholder in a corporation, that if a creditor would forego its demand for im-

FRAUDS, STATUTE OF—CONTINUED.

- mediate payment for goods sold to the corporation and would continue to sell and deliver goods to it, he would pay the same and become responsible therefor and would "indemnify and hold harmless" the seller for any loss on account of the extension of credit or sale of goods to it, is a promise to answer for the debt or default of another, within the statute of frauds, Rem. & Bal. Code, § 5289, and void when not in writing; and it is immaterial that he is directly interested as a stockholder. *Goldie-Klenert Distributing Co. v. Bothwell*..... 264
2. SAME—CONSTRUCTION—QUESTION FOR COURT. In such a case, the facts being admitted, the construction is one of law for the court. *Goldie-Klenert Distributing Co. v. Bothwell*..... 264
3. FRAUDS, STATUTE OF—PROMISE TO PAY DEBT OF ANOTHER—ORIGINAL UNDERTAKING. Where a contractor for dwellings sublet the plumbing, and failed to pay for the work, the owner's oral promise to the plumber to pay him, if he would not file a lien against the premises, is an original undertaking, and not a promise to answer for the debt or default of another within the statute of frauds. *Wells & Morris v. Brown*..... 351
4. SAME—ORIGINAL UNDERTAKING—CONSIDERATION—SUFFICIENCY. An agreement not to file a mechanics' lien against property is a sufficient consideration for the oral promise of the owner to pay for the work, so as to make the promise an original undertaking and not within the statute of frauds, and it is immaterial that the right to file the lien could have been contested for failure to comply with the statute relating to duplicate statements of the material furnished. *Wells & Morris v. Brown*..... 351
5. FRAUDS, STATUTE OF—BROKERS — COMMISSIONS — ORAL CONTRACT. Rem. & Bal. Code, § 5289, providing that an agreement employing an agent or broker to sell real estate for compensation or commissions shall be void unless in writing, applies only to contracts between the owner of the land and the agent to sell, and an oral agreement between brokers whereby one was to pay the other a specified commission for assistance in finding purchasers is enforceable. *Leigh v. Yancey* 18

FRAUDULENT CONVEYANCES:

See BANKRUPTCY.

By insolvent corporation, see CORPORATIONS, 11.

FUTURE PAIN:

As element of damage, see DAMAGES, 2.

GARNISHMENT:

Change of venue to residence of garnishee defendant, see VENUE, 1, 3.

GENERAL LAWS:

See STATUTES, 1.

GIFTS:

1. **GIFTS—INTENT—DELIVERY—NECESSITY.** While the law favors the free disposition of property, and the rigor of the earlier cases as to gifts is materially relaxed, a mere expression of an intent or purpose to give is not alone sufficient, and delivery, actual or constructive, is essential. *Jackson v. Lamar*..... 385
2. **GIFTS—PRESUMPTION—EVIDENCE.** An oral gift is not presumed, but title must be proven by clear, convincing, and satisfactory evidence. *Jackson v. Lamar*..... 385
3. **GIFTS—PROMISE TO MAKE GIFT—PERFORMANCE—ACCEPTANCE.** A gift cannot be supported by a promise to make a gift if the donee would come west and take charge of a farm, where the alleged donee, after coming west and acting upon the offer, accepted a deed of gift and a bill of sale of certain property definitely fixing and limiting the relation of the parties; the ownership of the property being fixed by the deed and bill of sale and not by the preliminary offer. *Jackson v. Lamar*..... 385
4. **GIFTS—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to show a gift by plaintiff's intestate of a wheat crop for the year 1906, and a threshing machine purchased by the deceased in July, 1906, about four months prior to his death, he having a few years previously deeded a valuable wheat farm and made bills of sale of all his personal property to three nephews (the alleged donees) reserving a life estate, where it merely appears that the deceased had stated to a nurse and notary that he had given all his personal property to the boys, and there was evidence of neighboring farmers showing that the boys had been in full control of the farm, and that the wheat receipts had been indorsed to them; especially in view of the fact that, a short time before his death, he had given checks to them closing up his bank account, without making any transfer of the wheat or threshing machine, their management of the farm being consistent with the written arrangement whereby the deceased reserved to himself all the rents and profits, and with his retention of the wheat crop and his purchase of the threshing machine on his own account, and there being no legal evidence that he ever parted with title to the property in dispute, or of any change in the possession thereof. *Jackson v. Lamar*..... 385

GUARANTY:

On sale of goods, see SALES, 5-7.

GUARD RAILS:

Injury to horse by catching foot between rail and guard rail, see STREET RAILROADS, 1, 4, 5.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 22-31.

In criminal prosecution, see **CRIMINAL LAW**, 19.

HEARSAY EVIDENCE:

In criminal prosecution, see **CRIMINAL LAW**, 2.

HIGHWAYS:

1. **HIGHWAYS—ESTABLISHMENT—POWERS OF COUNTY AND TOWNSHIPS—JURISDICTION:** Rem. & Bal. Code, § 9368, enlarging the powers of township officers over highways in the township and providing that nothing in the act shall affect the rights of counties over roads in which the county generally is interested, etc., does not affect the jurisdiction of the county over a county road wholly within the township sought to be established by the county commissioners, under Id., §§ 5623 to 5656; the township not being forced to aid in its construction. *Strunz v. Spokane County*..... 235
2. **HIGHWAYS—ESTABLISHMENT—APPEAL—REVIEW ON APPEAL.** Landowners cannot object to the confirmation of the establishment of a county road because of insufficiency of the county's tender of compensation for land to be taken, which, under Rem. & Bal. Code, §§ 5634, 5635, is not final; the statute providing that, if such tender is not accepted by the landowners, condemnation proceedings must be instituted for the purpose of fixing the damages. *Strunz v. Spokane County* 235

HOMICIDE:

1. **HOMICIDE—JUSTIFICATION—EVIDENCE—ADMISSIBILITY — WITNESSES—CONTRADICTION.** Upon a prosecution for homicide occurring in an altercation over a fence placed and defended by the accused in a private way, which was the only road for vehicles to the home of the deceased, evidence that a team could have been driven around the fence, by making a short detour over untraveled ground and an old logging road, is not admissible for the purpose of contradicting a witness for the state who testified that the private way was the only road for vehicles to the home of the deceased. *State v. Totten* 192
2. **SAME—STATE OF MIND OF ACCUSED — EVIDENCE — ADMISSIBILITY.** Neither is such evidence admissible as bearing on the state of mind of the accused when she shot and killed the deceased for tearing down the fence which she had helped her mother place in the road for the purpose of closing the road to the family of the deceased for its entire way. *State v. Totten*..... 192
3. **SAME—JUSTIFICATION—EVIDENCE—ADMISSIBILITY.** Neither is such evidence admissible to relieve the accused from being put in a bad light before the jury, as attempting to block the deceased from access to his home, where it was admitted that the purpose of the

HOMICIDE—CONTINUED.

- fence was to stop all trespassing by use of the only traveled road, especially where the court instructed the jury that the deceased was an unlawful trespasser, and that his destruction of the fence was an unlawful act which the accused had a right to resist to any degree short of taking human life. *State v. Totten*..... 192
4. **SAME—STATE OF MIND OF ACCUSED—EVIDENCE—ADMISSIBILITY.** In a prosecution for a homicide occurring in a quarrel between the deceased and the mother of the accused, which quarrel the accused took up three or four hours before the homicide, evidence of what occurred between the contending parties some time prior thereto, and of an offer by the mother of another way, is inadmissible for the purpose of showing the state of mind of the accused at the time of the homicide, where it is not shown that she was informed of the prior occurrences or of such offer. *State v. Totten*..... 192
5. **SAME—EVIDENCE—DECLARATIONS OF ACCUSED—SELF-SERVING DECLARATIONS.** Upon a prosecution for homicide, statements, not part of the *res gestae*, made by the accused to her husband expressing fear of the deceased and members of his family, are inadmissible as declarations of the accused made in her own favor. *State v. Totten* 192
6. **HOMICIDE—DEGREES—MANSLAUGHTER — INSTRUCTIONS.** Under the statute providing that homicides committed in certain ways shall constitute murder in the first degree, and if committed in certain other ways, murder in the second degree, and all other homicides, not being excusable or justifiable, shall be manslaughter, it is not error in defining manslaughter to use the words "voluntarily" and "involuntarily" as excluded in the definitions of first and second degree murder; and such words are not confusing as capable of a varied meaning without any further definition. *State v. Totten* 192
7. **HOMICIDE—MANSLAUGHTER—PRESUMPTIONS—BURDEN OF PROOF—INSTRUCTIONS.** An instruction that, a homicide being proven and murder in the second degree presumed, the burden upon the defendant to reduce it to manslaughter is sustained if, from all the evidence or want of evidence, the jury entertain a reasonable doubt as to defendant's guilt, is not objectionable as telling the jury that before the burden of reducing a homicide to manslaughter is sustained the jury must entertain a reasonable doubt of defendant's guilt. *State v. Totten* 192
8. **HOMICIDE — INSTRUCTIONS — PRESUMPTIONS OF INNOCENCE.** In a prosecution for homicide, an instruction that the presumption of innocence continues until it has been overcome by the evidence of the prosecution, beyond a reasonable doubt as to each and every material fact, is not open to the objection that the presumption of innocence could be overcome if the jury believed the evidence of the prosecution, without reference to the evidence of the defense,

HOMICIDE—CONTINUED.

where in other instructions the jury were told that the whole of the testimony bearing upon any particular fact must be considered in arriving at a conclusion as to such fact. *State v. Totten*.... 192

HOURS OF WORK:

Violation of eight-hour-day law, see MUNICIPAL CORPORATIONS, 3.

HUMILIATION:

As element of damages, see DAMAGES, 1.

HUSBAND AND WIFE:

See DIVORCE.

1. **HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—EVIDENCE—SUFFICIENCY.** In an action by a wife for conversion of stock held in trust for her by defendant, the stock is sufficiently shown to be separate property where she so testified, and all of the dealings of the trustee had been with her individually. *Hetrick v. Smith*.. 664
2. **HUSBAND AND WIFE—COMMUNITY PROPERTY—ADMINISTRATION.** Upon the death of either spouse, the entire community estate, and not the deceased's portion, is subject to probate. *Crowe & Co. v. Adkinson Construction Co.*..... 420
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—ADMINISTRATION—VENUE.** The widow is entitled to have administration of community personal property in the county of the domicile of the deceased at the time of his death. *Gamble v. Dawson*..... 72
4. **HUSBAND AND WIFE—COMMUNITY DEBT—ACTIONS—JUDGMENT—FORM.** In an action against a husband on a promissory note in which the wife was joined with a view of establishing the debt as their community debt, a judgment against the husband alone reciting that it is enforceable out of the separate and community property of the husband is not a judgment against the wife's community interest, or against the community. *Alaska Banking & Safe Deposit Co. v. Simmons*..... 673

IDENTITY:

Variance as to identity of person assaulted, see INDICTMENT AND INFORMATION, 4.

Of accused, see ROBBERY.

IMPEACHMENT:

Of witness, see INTOXICATING LIQUORS, 4; WITNESSES, 6.

IMPLIED CONTRACTS:

See CONTRACTS, 1.

IMPROVEMENTS:

Improvement of stream by boom company, see LOGS AND LOGGING, 2.
Public improvements, see MUNICIPAL CORPORATIONS, 5-9, 11, 12.

INCEST:

1. INCEST—CONSENT. One may be guilty of incest although the act was accomplished without consent. *State v. Hornaday*..... 660
2. INCEST—ACCOMPLICE. The female is not an accomplice in incest, where she at no time consented to the criminal relations. *State v. Hornaday* 660
3. INCEST—ACCOMPLICE—EVIDENCE—SUFFICIENCY. A conviction for incest may be had upon the uncorroborated evidence of an accomplice. *State v. Hornaday*..... 660

INCOME:

Construction of will as to payment of under legacy, see WILLS.

INDEMNITY:

Amount in controversy in action on bond as determining right to appeal, see APPEAL AND ERROR, 1.
Agreement of company to make defense in action on policy, see INSURANCE.
Subject and title of act requiring bond from contractors on public work, see STATUTES, 3, 4.

INDIANS:

Sale of liquor to Indian, see INTOXICATING LIQUORS, 2-4.

INDICTMENT AND INFORMATION:

Indorsement of names of witnesses on, see CRIMINAL LAW, 8.
Violation of liquor laws, see INTOXICATING LIQUORS, 2.

1. INDICTMENT AND INFORMATION—ELEMENTS OF OFFENSE—BRIBERY—EVIDENCE OF CONSPIRACY—ADMISSIBILITY. Where an indictment charges a chief of police with soliciting and accepting bribes from two others, under an agreement, understanding and promise to permit them to conduct houses of prostitution in violation of law, the unlawful conspiracy is an essential element, though not the gravamen of the offense, making proof of the conspiracy essential to establish the crime, and such proof could be made in the same manner as if the conspiracy was the gist of the offense. *State v. Wapenstein* 502
2. INDICTMENT AND INFORMATION—DUPLICITY—LARCENY. An information for grand larceny is not duplicitous, where it alleges that on a certain day and at a certain place the defendant, with intent to deprive the owner thereof, feloniously bought, received and concealed specified articles (stating the value) then and there knowing

INDICTMENT AND INFORMATION—CONTINUED.

that the same had been stolen; as all of the property was received at the same time and place, even though it belonged to different persons. *State v. Makovsky*..... 7

3. INDICTMENT AND INFORMATION—DUPLICITY—BRIBERY. Under Rem. & Bal. Code, § 2321, making the soliciting and accepting of a bribe a felony, an indictment charging that the accused asked for, received and accepted a bribe is not duplicitous, since the act of soliciting and the act of accepting a bribe are not separate and distinct offenses, and may be laid conjunctively in a single count. *State v. Wappenstein*..... 502
4. INDICTMENT AND INFORMATION—VARIANCE — MATERIALITY — IDENTITY OF PERSON ASSAULTED. It is not a material variance to allege an assault against Sylvia R. and to prove an assault against Sylvia E., where the defendant admitted the act and was not misled, in view of Rem. & Bal. Code, § 2061, providing that where the crime involves a private injury, it is sufficient if the information identifies the act with certainty and that an erroneous allegation as to the person injured is immaterial. *State v. Ewing*..... 395
5. SAME—VARIANCE—QUESTION FOR COURT. Upon an information for an assault against Sylvia R., and proof of an assault against Sylvia E., the court may decide, as a matter of law, that there was no material variance, where it was conceded that the true name was as established by the proof, and there was no claim or evidence that the defendant had been misled by the information. *State v. Ewing* 395

INDORSEMENT:

Of name of witness on indictment, see CRIMINAL LAW, 8.

INDUCEMENT:

To secure testimony of accomplices, see CRIMINAL LAW, 6.

INFANTS:

Custody and support on divorce of parents, see DIVORCE, 6, 9.

1. INFANTS—NEGLECTED CHILDREN—OFFENSES—STATUTES—CONSTRUCTION—EJUSDEM GENERIS. Rem. & Bal. Code, § 2004, providing punishment for the parents or persons having custody of a delinquent child "or any other person responsible for, or by any act" causing or contributing to the delinquency of, such child, is not subject to the rule of *ejusdem generis*, in view of the evident intent of the legislature to make the same apply to others than those *in loco parentis*, and also in view of the rule that where particular words exhaust a class, following general words must refer to some larger class. *State v. Plastino*..... 374

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INJUNCTION:

Against sublease of premises, see **LANDLORD AND TENANT**, 4.

To restrain unfair competition by fraudulent use of trade-name, see **TRADE-MARKS AND TRADE-NAMES**.

1. **INJUNCTION—ADEQUATE REMEDY AT LAW—VIOLATION OF EIGHT-HOUR-DAY LAW.** There is no adequate remedy at law and injunction lies to prevent the city from violating the eight-hour-day law, where it employed many teamsters and required them to work in excess of eight hours a day or "quit the job," the employment being mutually satisfactory and agreeable; and the city is not prejudiced by the form of the decree, even if there is a remedy by mandamus. *Davies v. Seattle*..... 532

INNOCENCE:

Instructions as to presumption of, see **HOMICIDE**, 8.

INSOLVENCY:

See **BANKRUPTCY**.

Of corporation, see **CORPORATIONS**, 11.

INSPECTION:

Sale of goods subject to inspection, see **SALES**, 2.

INSTRUCTIONS:

Review as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 29-31.

In criminal prosecutions, see **CRIMINAL LAW**, 15, 16, 19; **FALSE PRETENSES**; **HOMICIDE**, 6-8.

In civil actions, see **TRIAL**, 2.

INSURANCE:

1. **INSURANCE—CASUALTY INSURANCE—ACTION—DEFENSES TO POLICY—AGREEMENT TO MAKE DEFENSE—INDEMNITY—DILIGENCE.** In an action on a policy of casualty insurance, the assured is not entitled to show that, after giving notice of the accident, the company agreed to defend and the assured was injured in making its defense by being lulled into a feeling of security, where the assured entered appearance November 12, was informed before November 25 that the company would not make the defense, the trial took place the following July, and it did not appear that the assured used any diligence in preparing the defense, or that it was prevented from doing so by any act of the company. *Kitsap County Transportation Co. v. Pacific Coast Casualty Co.*..... 297
2. **SAME—POLICY—WAIVER OF PROVISIONS—EVIDENCE—SUFFICIENCY.** There is no evidence that a casualty insurance company waived the provisions of a policy exempting it from liability in case of accident to a passenger on a boat, where the policy provided that none of its provisions could be waived except by written consent of an officer,

INSURANCE—CONTINUED.

and the alleged waiver was merely the statement of a local agent that he had a personal letter from an officer saying that they would take charge of the case. *Kitsap County Transportation Co. v. Pacific Coast Casualty Co.*..... 297

INTENT:

Evidence admissible to show intent, see **CRIMINAL LAW**, 1.

To change or abandon domicile, see **DOMICILE**.

To make gift, see **GIFTS**, 1.

To adopt name in mortgage as signature, see **MORTGAGES**, 1.

INTERROGATORIES:

To jury, see **TRIAL**, 3.

INTIMIDATION:

Of witness to secure testimony, see **CRIMINAL LAW**, 6.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS—LOCAL OPTION LAW—APPLICATION—WHOLESALE DEALERS—STATUTES—CONSTRUCTION.** The local option law of 1909 (Rem. & Bal. Code, § 6292 *et seq.*) prohibits sales of intoxicating liquors by wholesalers in dry units, notwithstanding the proviso that wholesalers may deliver unbroken packages at residences in dry units; in view of the restrictions against all sales in any quantity whatsoever in dry units or the taking or soliciting of orders therein, and the often repeated use of the term "sale" whenever and wherever it was intended to permit a sale in a dry unit, which do not include sales by wholesalers, and also the safeguarding of sales by druggists in dry territory, and the general purpose and spirit of the act, all of which require that the proviso be strictly construed to conform to the language of the general provisions; consequently "sales" by wholesalers, whether located within or without the dry unit, must be made outside of the district. *State v. Robinson*.. 425
2. **INTOXICATING LIQUORS—SELLING OR GIVING AWAY—OFFENSES—INFORMATION—SUFFICIENCY.** In Rem. & Bal. Code, § 6288, providing that the selling or giving away of spirituous or vinous liquor of any kind, or any essence, extract, compound, or any article whatsoever which produces intoxication, the words "which produces intoxication" refers only to the antecedent essences, compounds, etc.; and an information for giving away "spirituous" liquors need not allege that it "produces intoxication," as all spirituous liquors are intoxicating. *State v. Bailey*..... 336
3. **SAME—GIVING LIQUOR TO INDIAN—EVIDENCE—SUFFICIENCY.** A conviction of giving liquor to an Indian is sustained, where there was evidence that defendant walked to a wagon with the Indian, concealing a bottle of alcohol under his coat and handed it to the Indian who put it in the front end of the wagon concealed in a gunny sack,

INTOXICATING LIQUORS—CONTINUED.

although the evidence was denied by the Indian and defendant; the credibility of the witnesses being for the jury. *State v. Bailey*. 336

4. **SAME—EVIDENCE—PURPOSE OF PURCHASE—IMPEACHMENT OF WITNESSES.** Upon a prosecution for giving liquor to an Indian, the defendant's statement that he bought the alcohol for medicinal use in treating rheumatism, may be impeached by testimony that he made the purchase for "mechanical purposes," where his purpose in making the purchase had a direct bearing upon his intent in giving it to the Indian and whether for use or for carriage as claimed by defendant. *State v. Bailey*..... 336
5. **INTOXICATING LIQUORS — SALES — LOCAL OPTION — CHARACTER OF LIQUORS — EVIDENCE — ADMISSIBILITY.** In a prosecution for selling liquor in a dry unit in violation of the local option law, samples of liquor taken from defendant's place of business a few days after the unlawful sale, are admissible in evidence as tending to show the character of his business, the samples being in the same condition as when taken. *State v. Baker*..... 595
6. **INTOXICATING LIQUORS—LOCAL OPTION—SALES—EVIDENCE — ADMISSIBILITY.** In a prosecution for unlawful sales of intoxicating liquors shipped into dry territory, expense bills and freight receipts issued by a railway agent tending to show shipments of casks of bottled beer from a brewery to defendant, are admissible in evidence, although only carbon copies, where the originals had been delivered to the defendant and could not be produced, and the casks had been delivered to him by a drayman. *State v. Baker*..... 595

IRRIGATION:

Condemnation of property for public use, see **EMINENT DOMAIN**, 1, 2.
 Agreement for water for, see **WATERS AND WATER COURSES**, 1-3.

ISSUANCE:

Wrongful issuance of corporate stock, see **CORPORATIONS**, 1-3.

JOINT TENANCY:

See **TENANCY IN COMMON**.

JUDGES:

Conduct of, see **CRIMINAL LAW**, 11, 12.
 Bias as ground for change of venue, see **VENUE**, 2.

JUDGMENT:

Review, see **APPEAL AND ERROR**.
 Affidavits on motion to vacate as part of record, see **APPEAL AND ERROR**, 9.
 Form and effect of against husband for community debt, see **HUSBAND AND WIFE**, 4.
 Collateral attack on tax judgment, see **TAXATION**, 3.

JUDGMENT—CONTINUED.

1. JUDGMENT—DEFAULT—FAILURE TO ANSWER—APPEARANCE. An answer filed after a default had been entered, without leave of court, and not served on the plaintiff, does not constitute an appearance preventing a judgment by default. *Hayworth v. McDonald*.... 496
2. JUDGMENT — DEFAULT — AMOUNT — JURISDICTION—COLLATERAL ATTACK. A default judgment on a bond for the amount of the penalty, and \$400 additional as attorney's fees, and for costs, is not void for want of jurisdiction as exceeding the penalty of the bond, but merely erroneous to be corrected by appeal or statutory proceeding; and the objection cannot be first raised on appeal from an order refusing to vacate the judgment on a motion based on other grounds. *Hayworth v. McDonald*..... 496
3. JUDGMENT — DEFAULT JUDGMENTS — VACATION — LIMITATIONS—RECOVERY OF REAL PROPERTY—STATUTES—CONSTRUCTION. In view of Rem. & Bal. Code, § 705, providing that any person having a valid interest in real property and a right to the possession thereof may recover the same by action in the proper county, and may have judgment in such action quieting or removing a cloud from the title, and § 809, authorizing an action to quiet title without including specific relief for the recovery of possession, the provision of § 806, authorizing the vacation of a default judgment in actions to recover possession of real property, where service was by publication, at any time within two years after entry of judgment, has no application to a judgment in an action to quiet title to vacant and unoccupied land the title to which was alleged to be in the plaintiffs, the complaint not seeking recovery of possession, but only the adjudication of adverse claims made by the defendants; since actions to quiet title and to recover possession are not essentially the same under our statutes. *Bruhn v. Pasco Land Co.*..... 490
4. SAME—VACATION FOR FRAUD—LIMITATIONS. A petition to vacate a judgment for fraud, under Rem. & Bal. Code, § 464, where there was no personal service on the defendant, under Id., § 235, is limited to one year after entry of the judgment, and cannot be entertained after that time, although an independent suit in equity to vacate for fraud might be maintained after the expiration of two years. *Bruhn v. Pasco Land Co.*..... 490
5. JUDGMENT—RES JUDICATA—SALES—ACTION FOR PRICE—DEFENSES—CONDITION OF ARTICLE. In an action for the price of butter sold and delivered, which defendant rejected because in bad condition and not according to sample, a judgment in a proceeding *in rem* by the state inspector condemning the butter as "renovated" butter, the sale of which was prohibited, is admissible in evidence to prove the condition of the butter at the time it was seized. *Makins Produce Co. v. Callison*..... 434

JUDGMENT—CONTINUED.

6. JUDGMENT—BAR—MATTERS CONCLUDED. A judgment quieting title against claims by infants alleging want of jurisdiction to render judgment of foreclosure, is *res judicata* and a bar to a subsequent action seeking to quiet title to the same lands by reason of defendants' collusive agreement with a judgment creditor as to redemption and failure to redeem from the foreclosure sale for plaintiff's benefit. *Merz v. Mehner*..... 135
7. JUDGMENT — BAR — RES JUDICATA — MATTERS DETERMINED. An injunction against the diversion of water from a creek until riparian rights are condemned and awarding damages for past diversions, is not an adjudication that the taking of twenty-two cubic feet of water thirteen miles above appellant's property would amount to a loss of that much water at the point of appellant's property. *Walla Walla v. Dement Brothers Co.*..... 186
8. JUDGMENT—CONCLUSIVENESS—BAR—MATTERS CONCLUDED. A judgment in an action for an accounting, brought by the receiver of a copartnership against a bank, is conclusive on any issue as to whether the bank had in its possession funds belonging to the partnership. *Aurora Land Co. v. Keevan*..... 305
9. JUDGMENT—RES JUDICATA—PARTIES AND MATTERS CONCLUDED. In an action for the price of butter sold and delivered, a judgment in a proceeding *in rem* condemning the butter as "renovated" butter, is not, as a matter of law, final and conclusive upon the plaintiff as to the status and condition of the butter at the time it was sold to the defendant three and one-half months before its seizure, where the facts were all in dispute. *Makins Produce Co. v. Callison*... 434
10. JUDGMENT—BAR—ESTOPPEL BY JUDGMENT—MATTERS THAT MIGHT HAVE BEEN LITIGATED. Where a holder of warrants brought a suit in equity setting out three warrants and alleging that he and others held other similar warrants, and that he brought the suit for the benefit of all to avoid a multiplicity of suits, seeking the affirmance of a principle upon which all of his warrants and others might be validated, and on appeal a decree established the validity of the three warrants in question, and remanded the case for the purposes of taking testimony to determine the validity of plaintiff's other warrants, opening the door of equity for plaintiff to establish the validity of all his warrants, whereupon he presented part of his warrants but withheld others, a final decree establishing the validity of the warrants presented by the plaintiff may be pleaded as an estoppel against a subsequent action prosecuted by plaintiff to establish other similar warrants held by him at the time but not presented in the first suit; since the same might have been litigated in the former action. *State ex rel. Gladwin v. Cheney*..... 151

JUDICIAL SALES:

On execution, see EXECUTION.

JURISDICTION:

See DIVORCE, 2.

Appellate jurisdiction, see APPEAL AND ERROR, 1, 2.

Of action by claimant of corporate stock, see CORPORATIONS, 4.

Of county over highways, see HIGHWAYS.

Want of, ground for collateral attack on judgment, see JUDGMENT.

Process to support, see PROCESS.

Foreclosure of tax certificate, see TAXATION, 2.

JURY:

Right to jury trial in civil contempt, see CONTEMPT, 1.

Instructions in criminal prosecutions, see CRIMINAL LAW, 15, 16, 19.

Custody and conduct, see CRIMINAL LAW, 17.

Right to jury trial, see TRIAL, 1.

Instructions in civil actions, see TRIAL, 2.

Verdict in civil actions, see TRIAL, 3.

JUSTIFICATION:

Of homicide, see HOMICIDE, 1, 3.

KNOWLEDGE:

Of local clerk as affecting society, see BENEFICIAL ASSOCIATIONS.

LACHES:

As bar to rescission by buyer, see SALES, 3.

LANDLORD AND TENANT:

1. LANDLORD AND TENANT—LEASE—PURPOSE. In the absence of any restrictions in a lease, the premises may be used for any lawful purpose. *Rockwell v. Eiler's Music House*..... 478
2. LANDLORD AND TENANT—LEASE—COVENANTS—CONDITIONS—SUBLET-
TING. Under a lease of a space to be used as a theater entrance,
covenanting that the same shall not be *assigned* without the writ-
ten consent of the lessor, and providing that the portion of the
premises not required for such purpose may be used by the lessee
for any lawful purpose, the lessee may sublet such portions without
the consent of the lessor; conditions against assignment and sub-
letting being strictly construed. *Burns v. Dufresne*..... 158
3. SAME — LEASE — CONSTRUCTION — AUTHORITY FOR ALTERATIONS IN
PREMISES. Where a lease of ground floor to be used for a theater
entrance provided that the lessee may at his own expense install
heat, water, and light by such piping and wiring as may be neces-
sary, the lessee is authorized to bore holes in the floor and connect
with water pipes by way of an unoccupied basement, although the
basement was expressly reserved to the lessor, where it appears
that there was no other way to make the connections, which did
not in any way interfere with the lessor's reasonable use of the
basement. *Burns v. Dufresne*..... 158

LANDLORD AND TENANT—CONTINUED.

4. **LANDLORD AND TENANT—SUBLETTING—PURPOSES—REMEDIES—INJUNCTION—WHEN LIES.** An injunction will not be granted at the suit of the owner against a sublease for the purpose of maintaining a cigar store and saloon, on the theory that no saloon license can be granted without the owner's consent under Rem. & Bal. Code, § 6290, where the lease contained no restrictions; since plaintiff can withhold his consent and prevent the issuance of the saloon license, and the sublessee is entitled to conduct any other lawful business on the premises. *Burns v. Dufresne*..... 158

5. **LANDLORD AND TENANT—LEASE—BREACH—REPAIRS—RIGHTS OF TENANT—RECOVERY OF RENT PAID—USE OF PREMISES.** A tenant who leased part of a building intending to use the same as a theater, cannot recover damages for breach of the lease in that the landlord, "did not disclose" that the building could not, under the ordinances of the city, be used for that purpose until an exit had been constructed, where the lease provided that the tenant should, at his own expense, make all changes and improvements in the building, and it was not alleged that the landlord refused to permit him to construct the exit, and did not mislead him as to the ordinances; since one contracting in a city with reference to matters governed by police regulations is charged with notice of the ordinances. *Rockwell v. Eiler's Music House*..... 478

6. **LANDLORD AND TENANT—LEASE—SURRENDER—ACCRUED RENT.** On the termination of the relation of landlord and tenant, the right to accrued rent is fixed by the terms of the lease, whether the termination was by reentry or surrender, and whether the rent was payable in advance for a period beyond the time of the surrender, or already paid up in advance. *Rockwell v. Eiler's Music House*..... 478

LARCENY:

Duplicity of information, see **INDICTMENT AND INFORMATION**, 2.

LAW OF THE CASE:

See **APPEAL AND ERROR**, 32.

LEASES:

See **LANDLORD AND TENANT**.

LEGACIES:

Specific legacies, see **WILLS**.

LEGISLATIVE POWER:

See **MUNICIPAL CORPORATIONS**, 17.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER — WORDS ACTIONABLE PER SE — PROVINCE OF COURT AND JURY.** A letter charging that an attorney presented forged receipts and attempted to collect money on them, is not libelous *per se*, it not being charged that he forged the receipts or that he uttered the same with guilty knowledge of the forgery. *Velikanje v. Millichamp*..... 138
2. **SAME — SPECIAL DAMAGES — PLEADING — NECESSITY.** Words not libelous *per se* are not actionable unless special damage is alleged. *Velikanje v. Millichamp*..... 138
3. **SAME—LIBEL PER SE—QUESTION FOR COURT.** Whether language is libelous *per se* is a question of law for the court, unless the writing is ambiguous. *Velikanje v. Millichamp*..... 138

LICENSES:

Payment by corporation as condition precedent to action, see **CORPORATIONS**, 7.
 Effect of failure to pay, see **CORPORATIONS**, 9, 10.

LIENS:

See **MECHANICS' LIENS**.
 Liability for omitting assessment lien from abstract, see **ABSTRACTS OF TITLE**.
 Creditor's liens in proceedings in bankruptcy, see **BANKRUPTCY**.
 Mortgage, see **CHATTEL MORTGAGES; MORTGAGES**.
 Priority of, see **EXECUTION**.
 Loggers' liens, see **LOGS AND LOGGING**, 3-6.
 Tax lien, see **TAXATION**.

LIFE EXPECTANCY:

Consideration of in action for damages, see **DAMAGES**, 8.

LIFE INSURANCE:

See **BENEFICIAL ASSOCIATIONS**.

LIMITATION:

Indebtedness incurred in excess of, see **MUNICIPAL CORPORATIONS**, 20, 21.

LIMITATION OF ACTIONS:

Vacation of default judgment, see **JUDGMENT**, 3, 4.

1. **LIMITATION OF ACTIONS — RELIEF ON GROUND OF FRAUD — CORPORATIONS—REDUCTION OF CAPITAL STOCK.** An action by a trustee in bankruptcy to recover the sum paid to the bankrupt's president on a sale of its capital stock, thereby diminishing the capital stock of the corporation, is one for relief upon the ground of fraud, and is not barred until the lapse of three years after the cause of action accrues, as provided in *Rem. & Bal. Code*, § 159, subd. 4; in view

LIMITATION OF ACTIONS—CONTINUED.

of Id., §§ 3697, and 3704-3706, making it unlawful to make a dividend or reduce the capital stock of a corporation except in the manner provided. *Union Trust Co. v. Amery*..... 1

2. **LIMITATION OF ACTIONS—TRUSTS—NATURE OF RELATION—TRUST OR AGENCY—RECOVERY OF DAMAGES.** An attorney who contracted with plaintiff and one C. to perfect the title to certain tide lands for a one-fourth interest therein, the title to be taken in the name of C. as trustee, does not become a co-trustee with C. and C's successors, where the lands were sold and defendants failed to account to plaintiff for her part of the proceeds; hence an action against the attorney and C's successors, to recover plaintiff's share of the proceeds, is not an action to declare a trust, as far as the attorney is concerned, but as to him, is an action at law for damages, to which the statute of limitations applies, where it is not alleged that the attorney received the title or any part of the proceeds which could be impressed with a trust, his codefendant being trustee for both parties. *Hotchkin v. McNaught-Collins Improvement Co.*..... 206

LOCAL OPTION:

See INTOXICATING LIQUORS, 1, 5, 6.

LOCATION:

Of boundary line, see BOUNDARIES.

LOGS AND LOGGING:

1. **LOGS AND LOGGING — CONTRACTS—PERFORMANCE OR BREACH—PARTIAL PERFORMANCE—DAMAGES.** Upon breach of a logging contract by defendant, plaintiffs can recover at the contract price for logs cut and delivered by them up to the time of defendant's breach. *Palmer v. Huston* 210
2. **LOGS AND LOGGING—IMPROVEMENT OF STREAMS—BOOM COMPANIES—TOLLS.** Under Rem. & Bal. Code, § 7123, providing that a boom company which had improved a navigable stream upon which it was not previously practicable to float logs, thereby aiding in the floating of logs, shall be entitled to driving charges on all logs placed in the stream without request to drive the same, it is entitled to driving charges without any actual work in handling the logs; the tolls being simply compensation for benefits conferred by improving the stream, and the right to impose the same being a right of government. *Franck v. Pittock & Leadbetter Lumber Co.*..... 553
3. **LOGS AND LOGGING—LIENS—ON LUMBER—TIME FOR FILING—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 1163, giving a logger's lien upon lumber while the same remains at the mill where it is manufactured or while in its possession and control, no lien can be claimed after the mill company had delivered it to a railway company, about a mile from the mill, the railway having taken possession and control of it. *Akers v. Lord*..... 179

LOGS AND LOGGING—CONTINUED.

4. LOGS AND LOGGING—LIENS—ELOIGNMENT—PRIOR TO FILING LIEN. Under Rem. & Bal. Code, § 1181, as to the eloignment of logs and timber "upon which there is a lien," there can be no eloignment prior to the filing of the lien. *Akers v. Lord*..... 179
5. SAME—PARTIES ENTITLED—COOK OR BOARDING-HOUSE KEEPER. Under the statute providing that a cook in a logging camp shall be regarded as a person who assists in obtaining the timber, one who runs a boarding house, furnishing all supplies for meals at so much per week to be paid for out of wages of the men, is not entitled to a lien as cook. *Akers v. Lord*..... 179
6. LOGS AND LOGGING—LIENS—ELOIGNMENT—REMEDIES OF OWNER—SUBROGATION. In an action to foreclose logger's liens, where the liability of the owner of the timber depends upon his own wrongful act in eloigning the same, he cannot claim the right to subrogation against the contractor who failed to pay the labor bills of the lien claimants; since subrogation depends upon equity. *Akers v. Lord* 179

MALICIOUS PROSECUTION:

1. MALICIOUS PROSECUTION—REASONABLE CAUSE—ADVICE OF PROSECUTING ATTORNEY—QUESTION FOR JURY. In an action for malicious prosecution the court cannot decide, as a matter of law, that defendant was justified by the advice of the prosecuting attorney, where there was evidence warranting the jury in concluding that the defendant did not fully and truthfully communicate to the prosecuting attorney all the material facts within his knowledge bearing upon the plaintiff's guilt, but without excuse withheld facts from which the prosecuting attorney would have advised against making the charge; the question of reasonable cause for the prosecution being in such case a question for the jury. *Baer v. Chambers*..... 357
2. SAME—DAMAGES—EVIDENCE—ADMISSIBILITY—WEALTH OF DEFENDANT. In an action for malicious prosecution, evidence of the financial worth of the defendant is inadmissible in this state, where punitive damages are not recoverable. *Baer v. Chambers*..... 357
3. SAME—EVIDENCE—ADMISSIBILITY—NEWSPAPER ACCOUNTS. In an action for malicious prosecution, plain newspaper accounts, without comment, of the prosecution and arrest of the plaintiff are admissible in evidence; but where defendant was not responsible for such articles, all matters therein save facts that could be ascertained from the complaint charging the offense and the proceedings had thereon are irrelevant and inadmissible where they would tend to prejudice the defendant before the jury. *Baer v. Chambers*.... 357
4. SAME—DAMAGES—PROBABLE RESULT OF ARREST—EVIDENCE—ADMISSIBILITY. In an action for malicious prosecution, the amount of the recovery cannot be enhanced by evidence that the plaintiff

MALICIOUS PROSECUTION—CONTINUED.

caught cold while in jail, that not being the probable result of his arrest, where there was no evidence showing the bad or unhealthful condition of the jail; although evidence of the condition of the jail is admissible. *Baer v. Chambers*..... 357

MANDATE:

To lower court on decision on appeal, see **APPEAL AND ERROR**, 32.

MANSLAUGHTER:

Instructions defining, see **HOMICIDE**, 6, 7.

MARRIAGE:

See **HUSBAND AND WIFE**.

Effect of remarriage of wife on enforcement of decree for alimony, see **DIVORCE**, 5, 6.

MASTER AND SERVANT:

Validity of law regulating hours of work for female employees, see **CONSTITUTIONAL LAW**, 2, 5, 6.

Restraining violation of eight-hour day law, see **INJUNCTION**.

Liens for labor and materials, see **MECHANICS' LIENS**.

Violation by city of eight-hour day law, see **MUNICIPAL CORPORATIONS**, 3.

Authority of traveling salesman, see **PRINCIPAL AND AGENT**, 2.

1. **MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—EVIDENCE—SUFFICIENCY.** Negligence in lowering a heavy bucket, containing three tons of concrete, into the forms for a bridge pier, while the bucket was swinging, whereby it broke the forms and caused the death of an employee at the base of the pier, is a question for the jury, where the city engineer testified that a swinging bucket should be stopped by the signalman before it entered the forms, which was not done, and a witness testified that the bucket had a swing of 10 or 12 feet; and it is immaterial that no witness testified as to what caused the swinging, or how it could be stopped; the inference from natural laws being sufficient. *Parr v. Spokane*..... 164
2. **MASTER AND SERVANT—SAFE PLACE TO WORK—NEGLIGENCE OF MASTER—PROXIMATE CAUSE—EVIDENCE—SUFFICIENCY.** Where a concrete man was sent to work in a pocket formed by the wooden forms for a pier and arch, and a peavey used by carpenters' helpers upon the arch was dropped upon him, crushing his skull, whether the master was guilty of negligence in failing to furnish a safe place to work, and if so, whether the same was the proximate cause of the injury, are questions for the jury, where there was evidence from which the jury might have found that his place for work was at the bottom of a small enclosed pocket 25 feet deep, that the wooden wall for the arch formed an incline on which anything dropped would slide down into the pocket, making the place exceedingly danger-

MASTER AND SERVANT—CONTINUED.

- ous while men were working on the arch above, that a screen or barrier could have been easily placed to catch falling objects, but none was provided, that no men were at work on the arch when the plaintiff was sent into the pocket, and no warning given that men would be placed there, and that the men sent to work on the arch out of plaintiff's sight and hearing were using heavy tools and handling timbers, and the master gave the plaintiff no notice of the changed conditions increasing the dangers of the place. *Richardson v. Spokane*..... 621
3. MASTER AND SERVANT—FELLOW SERVANTS—TEMPORARY STAGING—DETAILS OF WORK. A carpenter's helper who fell from temporary staging which he was assisting in building, cannot recover of the master for negligence of the carpenters in nailing a support with only one nail near its upper edge and in using cross-grain material, where the plan of construction was a good one and sufficient material was furnished and the carpenters were competent and made their own selection of materials and used their own judgment as to the number of nails required; since the accident was due to the neglect of fellow servants in mere details of the work. *Swanson v. Sound Construction and Engineering Co.*..... 128
 4. SAME—FELLOW SERVANTS—CONCURRING NEGLIGENCE. In such a case, there is no question of the negligence of a fellow servant involved, especially where there was evidence that the peavey did not fall through the negligence of the carpenter's helper, but through the vibration caused by the work on the arch; concurring negligence of a fellow servant being no defense. *Richardson v. Spokane*... 621
 5. MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE—NEGLECT OF SIGNALMAN—FELLOW SERVANTS. A servant working by order of the foreman at the base of a bridge pier while the forms were being filled with concrete, may assume the safety of the place, and does not assume the risk of negligence of the signalman whereby a bucket of concrete broke the forms; as the signalman is not a fellow servant but a vice principal performing a nondelegable duty of the master. *Parr v. Spokane*..... 164
 6. MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS—EVIDENCE—SUFFICIENCY. The risk of being struck by the butt of a falling tree is obvious and necessarily incident to the work of slashing trees and brush and is assumed by a man, thirty-four years of age, of ordinary understanding and experience, although he had had no previous experience in that work and was not warned of the danger. *Fisher v. Stone & Webster Engineering Corporation*... 176
 7. MASTER AND SERVANT—SAFE PLACE—EXCAVATIONS—ASSUMPTION OF RISKS—OBEDIENCE TO ORDERS. A laborer in a ditch being directed by his employer to work in a particular place at a particular time, the employer being present, may assume the safety of the place,

MASTER AND SERVANT—CONTINUED.

and may recover for injuries received by the falling back of a rock, negligently left on the edge of the ditch at the surface without sufficient support. *Fueston v. Langan*..... 212

MATERIALS:

Foreclosure of lien against property of estate for materials furnished contractor, see EXECUTORS AND ADMINISTRATORS, 2, 3.

Lien for, see MECHANICS' LIENS.

Liability of city for on failure to take bond from contractor, see MUNICIPAL CORPORATIONS, 5.

MEASURE OF DAMAGES:

See DAMAGES.

For civil contempt for violation of judgment, see CONTEMPT, 3.

For breach of contract to furnish water for irrigation, see WATERS AND WATER COURSES, 3.

MECHANICS' LIENS:

Foreclosure against property of estate, see EXECUTORS AND ADMINISTRATORS, 2, 3.

1. **MECHANICS' LIENS—RIGHT TO LIEN—WAIVER.** The right to a mechanics' liens on a subcontract is not waived by the fact that the subcontractor relied upon the credit of the principal contractors when he entered into his contract, he not intending to waive his right. *Smith v. Hopper*..... 224
2. **SAME—RIGHT TO LIEN—MATERIALS—ACCOUNT.** A painter under a subcontract does not lose his right to a lien from the fact that he did not keep an accurate book account of the paint which he took and used from another job, where he is able to state the amount and value of the same. *Smith v. Hopper*..... 224
3. **SAME—PERFORMANCE OF CONTRACT—ALTERATIONS—EVIDENCE.** A building contract authorizing the architect to order any alteration in plans or specifications without in any way interfering with or lessening the agreement, does not authorize the architect to order a complete change in the interior finish, whereby the cost of a painting contract amounting to \$230 would have been increased \$145, the architect requesting him to do the work for an increase of \$25; and upon conflicting evidence as to whether the plaintiff was ordered to cease work, findings that he had performed and could treat the contract as rescinded will be sustained. *Smith v. Hopper* 224
4. **MECHANICS' LIENS—NOTICE—EXCESSIVE CLAIM—WAIVER.** An inadvertent and excusable mistake making an erroneous charge in a mechanics' lien notice will not defeat the lien, where at the commencement of the trial it was conceded and all excess waived. *Hillman v. Donaldson*..... 410

MEMORANDA:

Required by statute of frauds, see **FRAUDS, STATUTE OF.**

MENTAL SHOCK:

Evidence of in action for injuries, see **EVIDENCE, 2.**

MINORS:

See **INFANTS.**

Presentment of claim for against county, see **COUNTIES.**

Right to recover damages sustained after majority, see **DEATH, 1.**

Custody and support on divorce of parents, see **DIVORCE, 6, 9.**

MISCONDUCT:

Of judge as harmless error, see **APPEAL AND ERROR, 24.**

Of judge in criminal prosecution, see **CRIMINAL LAW, 11, 12.**

Of counsel at criminal trial, see **CRIMINAL LAW, 13, 14.**

Of jury at criminal trial, see **CRIMINAL LAW, 17.**

Of counsel ground for new trial, see **NEW TRIAL, 2.**

MISREPRESENTATION:

See **FALSE PRETENSES; FRAUD.**

Inducing sale, see **SALES, 1, 3.**

MISTAKE:

In making abstract of title, see **ABSTRACTS OF TITLE.**

Ground for relief in equity, see **EQUITY.**

In execution of mortgage, see **MORTGAGES, 1, 2.**

Cured by amendment, see **PLEADING, 4.**

In placing property on tax roll, see **TAXATION, 4.**

MODIFICATION:

Of decree in divorce, see **DIVORCE, 2.**

MONEY LOANED:

1. **MONEY LENT—EVIDENCE—SUFFICIENCY.** A judgment for money loaned is sustained by evidence that the plaintiff loaned the money, either to defendant or one W., and placed it in the hands of W. to pay defendant's obligations, and that it was so used, although there was conflict involving the credibility of witnesses as to whether the loan was made upon the credit of defendant or W. *Lewis v. United Collieries Co.*..... 311

MORTALITY TABLES:

Admissibility in evidence, see **DAMAGES, 9.**

MORTGAGES:

Personal property, see **CHATTEL MORTGAGES.**

Priority of lien of over judgment lien, see **EXECUTION.**

1. **MORTGAGES—EXECUTION—SIGNING—ACKNOWLEDGMENT —ADOPTION OF SIGNATURE—INTENTION.** Under Rem. & Bal. Code, § 8746, requir-

MORTGAGES—CONTINUED.

- ing deeds to be signed and making the acknowledgment a necessary part of its execution, the acknowledgment of a mortgage which the mortgagor inadvertently omitted to sign, and her intention to sign, is not equivalent to, or a substitute for, an actual signing, which is required by the statute in order to pass title, nor can it be said that she intended to adopt as her signature her name written in the mortgage as the grantor (overruling, on rehearing, *Id.*, 64 Wash. 54). *American Savings Bank & Trust Co. v. Helgesen*..... 572
2. MORTGAGES—RENEWAL—RELEASE—MISTAKE IN EXECUTION—EQUITABLE SUBSTITUTION. Where new notes and a mortgage were given, not in satisfaction, but in renewal of a former mortgage on the same security, and the cancellation of the old and substitution of the new mortgage were contemporaneous acts, equity, looking to the substance rather than the form, will, when the new mortgage is found ineffectual for want of proper execution, disregard the release as failing for want of consideration, and substitute the old mortgage as a continuing lien securing the continuing debt, as between the parties, by a doctrine akin to equitable subrogation. *American Savings Bank & Trust Co. v. Helgesen*..... 572
3. MORTGAGES—FORECLOSURE—SALES—TITLE. A mortgage foreclosure sale conveys the whole title subject to redemption with right to possession and rents. *Merz v. Mehner*..... 135
4. MORTGAGES —FORECLOSURE —RENEWAL—EQUITABLE SUBSTITUTION. Upon the foreclosure of a void mortgage, given in renewal of a former mortgage, upon the same security, a decree foreclosing the void mortgage may be sustained, as between the parties, by the equitable substitution of the old mortgage as a continuing lien securing the continuing debt without the necessity of a new trial. *American Savings Bank & Trust Co. v. Helgesen*..... 572
5. MORTGAGES — FORECLOSURE — DECREE—SALE—SECOND SALE FOR INSTALLMENTS DUE AFTER JUDGMENT. Under Rem. & Bal. Code, § 1126, providing that on foreclosure of a mortgage upon which installments are not due, the final judgment shall direct at what time and upon what default any subsequent execution shall issue, and *Id.*, §§ 1127, 1128, providing for sales in parcels or as a whole, and that in case of sales in parcels the judgment shall remain and be enforced upon any subsequent default, after final decree an order may be entered directing a sale to satisfy installments that have since become due; and the fact that the defendant had paid the amount due on the judgment does not prevent further proceedings in the case in the nature of a second judgment directing sale for subsequent installments; the judgment being conclusive as to the validity of the mortgages and all defenses except those accruing subsequent to the decree, which may be set up on application for subsequent executions. *Naden v. Christopher*..... 578

MORTGAGES—CONTINUED.

6. **MORTGAGES—FORECLOSURE—SALES—REDEMPTION.** A redemption by one who is not a tenant in common or co-owner does not inure to the benefit of others claiming an interest which was sold subject to redemption. *Merz v. Mehner*..... 135

MUNICIPAL CORPORATIONS:

Acquiring street by open and adverse use, see **ADVERSE POSSESSION**. 1.
Control by state of city franchise to telephone company as exercise of police power, see **CONSTITUTIONAL LAW**, 3, 4.

Dedication of city street, see **DEDICATION**.

Restraining city from violating eight-hour-day law, see **INJUNCTION**.

1. **MUNICIPAL CORPORATIONS—CHARTERS — ORDINANCES—IMPLIED REPEAL—OFFICERS.** A new city charter, purporting to be the entire organic law of the city, which provides that every ordinance in force at the time of its adoption not inconsistent with the charter shall continue in force until amended or repealed, and that employees within the scope thereof in office at the time of its adoption shall retain their positions, does not continue the office of city bacteriologist, provided for pursuant to provisions of the old charter establishing a board of health, where the new charter makes no provision for such office or for any board of health, but leaves that subject to be regulated by the general laws in force applicable to all cities whose charters make no special provisions for boards of health; since the new charter is in no sense an amendment of the old, which is effectually repealed, even though there is no express repealing clause. *State ex rel. Rose v. Hindley*..... 240
2. **MUNICIPAL CORPORATIONS—OFFICERS—RIGHT TO OFFICE—ESTOPPEL TO QUESTION RIGHT.** Upon a proceeding against a city for reinstatement to an office that had been abolished by city charter, it is immaterial that another person had been employed to fill the same position. *State ex rel. Rose v. Hindley*..... 240
3. **MUNICIPAL CORPORATIONS—EIGHT-HOUR DAY — LABOR BY TEAMSTERS.** Rem. & Bal. Code, § 6575, providing that all work by contract or day labor done for the state or any of its political subdivisions, shall be performed in work days of not more than eight hours a day, is violated by requiring city teamsters to harness and hitch their teams, collect their tools, and be at the place of work before the legal day begins, so as to put in eight hours "on the job," and thereafter return to the barn and unhitch and unharness their teams, putting in about an hour in excess of the lawful eight-hour day. *Davies v. Seattle*..... 532
4. **MUNICIPAL CORPORATIONS—WARRANTS—VALIDITY OF CONTRACT WITH OFFICER.** Warrants issued under a contract made between the city and the president of a water company at a time when he was mayor of the city are voidable at common law, at the option of the city. *State ex rel. Gladwin v. Cheney*..... 151

MUNICIPAL CORPORATIONS—CONTINUED.

5. MUNICIPAL CORPORATIONS—PUBLIC WORK—FAILURE TO TAKE BOND—LIABILITY FOR MATERIAL—DELIVERY—EVIDENCE—SUFFICIENCY. In an action against a city by a materialman to recover for lumber sold and shipped to the contractor, the city having failed to take a bond for the protection of materialmen, the plaintiff is not precluded from recovery by the fact that the actual delivery of the lumber from the cars to the work was made by the employees of the contractor, where it sold and delivered the same to the contractor for use in such work, and it was actually used therein. *Gate City Lumber Co. v. Montesano*..... 594
6. MUNICIPAL CORPORATIONS—PUBLIC WORKS—BONDS TO SECURE LABORER AND MATERIALMEN—SUBJECTS INCLUDED—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, §1159, requiring contractors on public work to furnish a bond to pay all laborers, mechanics, subcontractors and materialmen and all persons who shall supply such persons with provisions or supplies for carrying on such work, all just debts, dues and demands incurred in the performance of the work, the liability on the bond is not limited to such provisions and supplies as enter into and become a part of the finished product, as in the case of liens under the lien laws of the state, notwithstanding that there is an analogy between the two laws; and the legislature has power to so provide. *National Surety Co. v. Bratnober Lumber Co.*..... 601
7. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—EXCESSIVE AND ARBITRARY APPORTIONMENT—ABUSE OF DISCRETION—REVIEW BY COURTS. While the courts will be slow to interfere with the discretion of eminent domain commissioners in fixing the limits of a special assessment district, yet an assessment will be set aside as arbitrary and an abuse of discretion, where one block was assessed for three times the depth of the block on the opposite side of the street, and twice the depth of other blocks on the same side of the street, in amounts proportionally greater, apparently merely because it was all owned by one person, and without any possible suggestion that, from its situation or the lay of the land, it would receive any greater benefit from the improvement. *Spokane v. Kraft* 245
8. SAME—REVIEW—DECISION—REMAND—NEW ASSESSMENT. Upon reversing on appeal the confirmation of an assessment for a local improvement on the ground that one block was arbitrarily assessed an excessive amount, an entirely new assessment will be ordered, inasmuch as the amount to be deducted from the property in question could not be assessed to other owners without a new notice of the increase. *Spokane v. Kraft*..... 245
9. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—OBJECTIONS—WAIVER—ACTION TO SET ASIDE. Objections going to the regularity of an assessment for a local improvement are cured by con-

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- firmation of the assessment roll, in the absence of appeal therefrom, and cannot be made the basis for an action to set aside the assessment. *Norman v. Spokane*..... 630
10. MUNICIPAL CORPORATIONS—STREETS—DEDICATION—ESTOPPEL—PAYMENT OF TAXES. The payment of taxes and local assessments upon a strip of land used adversely as a street, for the prescriptive period, under a dedication by estoppel and user, does not estop the city from claiming the same as a street by dedication and prescription. *Seattle v. Hinckley*..... 273
11. SAME—ESTOPPEL—COURT PROCEEDINGS—VACATION OF STREETS. Nor would the city be estopped by the fact that the city attorney, out of an excess of caution, included a portion of the strip in condemnation proceedings for the widening of streets, where the claimants in no wise altered their position by reason of the condemnations; especially in view of Rem. & Bal. Code, § 7840, providing an exclusive method for the vacation of streets. *Seattle v. Hinckley*... 273
12. MUNICIPAL CORPORATIONS — STREETS—ABANDONMENT —VACATION. The condemnation and improvement of a new street, covering part of, and to take the place of, and old street, the use of which as a street has since been abandoned by the city, and which formerly gave the only access to plaintiff's abutting property, does not constitute a vacation of the old street so as to vest title to the old street in the plaintiff; in view of Rem. & Bal. Code, § 7840 *et seq.*, providing the manner in which street vacations may be obtained by persons owning an interest in abutting property, as the same provides an exclusive remedy, without which the council has no power to vacate streets. *Heuston v. Tacoma*..... 92
13. MUNICIPAL CORPORATIONS—STREETS—VACATION—DAMAGES. The vacation of a street will not be enjoined at the suit of citizens whose property does not abut on the vacated portion and access is not cut off, or who do not sustain special physical damage different in kind rather than in degree from that suffered by the public. *Freeman v. Centralia*..... 142
14. SAME. Mere inconvenience from the vacation of a street, where access to property is preserved over other streets, is not a taking of or damage to property not abutting on the vacated portion of the street. *Freeman v. Centralia*..... 142
15. SAME—VACATION—CONTROL BY COURTS. The fact that vacated streets may be put to private uses, and that the vacation was instigated by private interests affected does not warrant interference with the city council's action in vacating the streets; the courts not inquiring into the motive for legislative action. *Freeman v. Centralia*..... 142
16. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—EXCLUSIVE FRANCHISE—STREET RAILWAYS. Rem. & Bal. Code, § 9080, providing that

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a city may grant authority for the construction of electric railways upon, over, along and across any public street and prescribe the grade or elevation at which the same shall be maintained, authorizes the city, by clear and unmistakable language, to grant a franchise giving a street railway company the right to build a track on a trestle in a portion of the street, excluding the public therefrom, upon condemnation of the abutter's easements of access, light, and air, under Id., § 9081. *State ex rel. Ford v. Superior Court*.... 10

17. **MUNICIPAL CORPORATIONS—APPLICATION OF GENERAL LAWS—CONSTITUTIONAL LAW—LEGISLATIVE POWERS—DELEGATION TO MUNICIPAL CORPORATIONS—RESTRICTIONS—SPECIAL CHARTERS—TELEPHONE COMPANIES—FRANCHISE—RATES—CONTROL.** Const., art. 11, § 10, authorizing the adoption of charters by cities of the first class, which provides that the same shall be "subject to and controlled by general laws," and Id., § 11, which authorizes a city to make police regulations not in conflict with general laws, are to be construed as a reservation of a general legislative power in the state; so that a franchise granted by a city to a telegraph company under authority of a special city charter is subject to such reservation, and may be controlled or modified by subsequent acts of the legislature. *State ex rel. Webster v. Superior Court*..... 37

18. **MUNICIPAL CORPORATIONS—USE OF STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A pedestrian hurrying diagonally across a busy street to catch a street car on the opposite side of the street, is guilty of contributory negligence, as a matter of law, preventing recovery for damages from being struck by an automobile going in the opposite direction, where it appears that she left the curb 150 feet from the crossing, near a standing express wagon which obstructed her view of approaching vehicles, that she walked from behind the express wagon and stepped in front of the approaching automobile without seeing it, and the driver did not see her until she was struck, notwithstanding that the automobile was being driven at the rate of 25 miles an hour. *Harder v. Matthews*..... 487

19. **MUNICIPAL CORPORATIONS—SIDEWALKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** Plaintiff, injured by a fall by stepping on a loose plank in a defective sidewalk, is not guilty of contributory negligence, as a matter of law, from the fact that many of the boards were loose and rattled when stepped on, he never having been over the walk before; plaintiff having a right to assume the safety of the walk. *Lindquist v. Seattle*..... 230

20. **MUNICIPAL CORPORATIONS—INDEBTEDNESS—LIMIT—MANDATORY EXPENSES.** Indebtedness incurred by a city for the salary of its officers, wages of employees for necessary services and for material and supplies in the conduct of its necessary affairs, is valid although in

MUNICIPAL CORPORATIONS—CONTINUED.

- excess of the constitutional limit of indebtedness. *Pilling v. Everett* 109
21. SAME—INDEBTEDNESS — VALIDATIONS — DEBTS THAT CAN BE VALIDATED. Indebtedness incurred by a city in excess of the constitutional limit of five per cent may be validated by an election if, at the time of the election, the debt did not exceed such constitutional limit, and if it was incurred for a bridge or like property, comparatively new and in the possession and beneficial use of the city. *Pilling v. Everett*..... 109
22. MUNICIPAL CORPORATIONS—FILING CLAIMS—NECESSITY—VERIFICATION OF CLAIM—STATUTES—CONSTRUCTION. Laws 1909, p. 627, requiring claims against a city for personal injuries to be filed within thirty days, giving the residence of the claimant, specifying the items of damage, and verified, is mandatory and an action cannot be maintained unless the claim filed complies with all the requirements. *Benson v. Hoquiam*..... 90
23. SAME—NOTICE OF CLAIM—SUFFICIENCY. In such a case, notice to the city officers by a claimant resident in the city cannot take the place of the claim required to be filed with the city clerk. *Benson v. Hoquiam*..... 90
24. MUNICIPAL CORPORATIONS—CLAIMS—DESCRIPTION OF INJURY. A claim against a city "accurately describes" the injury, within the requirements of a city charter, so as to admit proof of a sprained ankle causing permanent injuries, where it alleges that claimant's leg was fractured and bruised necessitating a surgical operation and that claimant will be disabled many months. *Lindquist v. Seattle* 230

MURDER:

See HOMICIDE.

NAMES:

See TRADE-MARKS AND TRADE-NAMES.

Indorsing name of witness on indictment, see CRIMINAL LAW, 8.

NECESSITY:

Recording transfer of corporate stock on books of company, see CORPORATIONS, 2, 3.

Corroboration of testimony of accomplice, see CRIMINAL LAW, 5.

Indorsing name of witness on indictment, see CRIMINAL LAW, 8.

For delivery of gift, see GIFTS, 1.

Pleading special damage, see LIBEL AND SLANDER, 2.

Of compliance with statute requiring claims for personal injuries, see MUNICIPAL CORPORATIONS, 22.

NEGLIGENCE:

- In making abstract of title, see **ABSTRACTS OF TITLE**.
- Measure of damages, see **DAMAGES**.
- Causing death, action for damages, see **DEATH**.
- Of master causing injury to servant, see **MASTER AND SERVANT**.
- Of person injured on street, see **MUNICIPAL CORPORATIONS**, 18, 19.
- Of carrier in maintenance of track and operation of cars, see **STREET RAILROADS**.
- Of person injured by operation of street railroad, see **STREET RAILROADS**, 3.
- Maintenance of irrigation canal, see **WATERS AND WATER COURSES**, 4.

NEGOTIABLE INSTRUMENTS:

- See **BILLS AND NOTES**.

NEW PARTIES:

- Bringing in new parties, see **PARTIES**.

NEW TRIAL:

- Denial of motion for as fixing time for appeal, see **APPEAL AND ERROR**, 11.
- After remand of cause, see **APPEAL AND ERROR**, 32.
- 1. **NEW TRIAL — GROUNDS — INSUFFICIENCY OF EVIDENCE — ABUSE OF DISCRETION.** It is an abuse of discretion to refuse a new trial for insufficiency of the evidence to sustain the verdict where the evidence as a whole is insufficient, although there is some slight evidence, which, standing alone, might sustain the verdict. *Koenig v. Whatcom Falls Mill Co.*..... 632
- 2. **NEW TRIAL—MISCONDUCT OF COUNSEL—DISCRETION—APPEAL — REVIEW.** The refusal of a new trial for misconduct of counsel in argument to the jury is largely in the discretion of the trial court, and it is not an abuse of discretion to deny a new trial, where, in an action for injuries sustained in a railway wreck through the admitted negligence of the railway company, the only issue being the amount of the damages, counsel for plaintiff commented on the gross negligence of the defendant in an improper and inflammatory manner, and upon exceptions taken, the court ruled that the question of negligence had been eliminated and was not within the issues; especially where the trial court reduced the amount of the verdict rendered. *Taylor v. Spokane, Portland & Seattle R. Co.*.. 96

NONRESIDENCE:

- Substituted service on nonresident stockholder, see **PROCESS**.

NOTES:

- Promissory notes, see **BILLS AND NOTES**.

NOTICE:

- Of appeal, see **APPEAL AND ERROR**, 8.
- Erroneous charge in lien notice, see **MECHANICS' LIENS**, 4.
- Claim for injuries, see **MUNICIPAL CORPORATIONS**, 22-24.
- Of action, see **PROCESS**.

OBJECTIONS:

- Necessity for purpose of review, see **APPEAL AND ERROR**, 5; **CRIMINAL LAW**, 18.
- Waiver on appeal, see **APPEAL AND ERROR**, 23.
- To assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 9.
- Waiver of objections to evidence as to transactions with deceased, see **WITNESSES**, 2.

OBLIGATION OF CONTRACT:

- Laws impairing, see **CONSTITUTIONAL LAW**, 3, 4.

OFFICERS:

- Expiration of term of office as cessation of controversy to determine title, see **APPEAL AND ERROR**, 3.
- Bribery, see **BRIBERY**.
- Corporate officers, see **CORPORATIONS**, 1, 2, 5, 6.
- Acceptance of bribe by chief of police, see **CRIMINAL LAW**, 1-4, 7, 11.
- Highway officers, see **HIGHWAYS**.
- Municipal officers, see **MUNICIPAL CORPORATIONS**, 1, 2, 4.

OPENING:

- Judgment, see **JUDGMENT**, 3, 4.

OPINION EVIDENCE:

- In civil actions, see **EVIDENCE**, 9.

OPINIONS:

- Representations as expression of opinion, see **SALES**, 1.

ORAL CONTRACTS:

- See **FRAUDS, STATUTE OF**.
- Compelling performance of, see **SPECIFIC PERFORMANCE**.

ORDER OF PROOF:

- In criminal prosecution, see **CRIMINAL LAW**, 9.

ORDERS:

- Review, see **APPEAL AND ERROR**, 2.
- To appear for examination, party or witness, see **WITNESSES**, 3.

ORDINANCES:

- Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 1.

ORIGINAL UNDERTAKING:

See FRAUDS, STATUTE OF, 3, 4.

OWNERSHIP:

Evidence of as determining liability of owners for injury to passenger, see CARRIERS, 2.

PARENT AND CHILD:

Right of child to recover for death of parent, see DEATH.

Custody of child on divorce, see DIVORCE, 6, 9.

Causing or contributing to delinquency of child, see INFANTS.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

Compelling performance of, see SPECIFIC PERFORMANCE.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 6-8.

To explain water contract, see WATERS AND WATER COURSES, 2.

PARTIES:

Obligors in bond on appeal, see APPEAL AND ERROR, 7.

On whom notice of appeal need be served, see APPEAL AND ERROR, 8.

Entitled to allege error, see APPEAL AND ERROR, 12.

Rights and liabilities as to costs, see COSTS.

Persons entitled to sue for causing death, see DEATH.

In contempt proceedings to enforce decree for alimony, see DIVORCE, 4.

Persons liable for causing or contributing to delinquency of child, see INFANTS.

Persons concluded by judgment, see JUDGMENT, 9.

Persons entitled to logger's lien, see LOGS AND LOGGING, 5.

Persons entitled to mechanics' lien, see MECHANICS' LIENS.

Persons entitled to relief by prohibition, see PROHIBITION.

Co-tenants, see TENANCY IN COMMON.

1. PARTIES — BRINGING IN NEW PARTIES—ASSIGNMENTS — EQUITABLE DEFENSES AGAINST ASSIGNOR. In an action upon an assigned account, where the defendant sets up equitable defenses seeking equitable relief against the assignor, the court has power to require the assignor to be made a party to the end that a complete determination of the controversy may be had, under Rem. & Bal. Code, § 273, giving the defendant the right to set forth legal or equitable defenses, and § 196, authorizing the court to bring in the real parties in interest. *State ex rel. Adjustment Co. v. Superior Court*..... 355
2. PARTIES — BRINGING IN NEW PARTIES — PLEADINGS—AMENDMENTS. In an action for trespass by the cutting of timber, it is not error to allow a trial amendment to the complaint, bringing in as plaintiffs

PARTIES—CONTINUED.

the plaintiff's father and mother, after the testimony showed that the legal title to the land was in the son and that the parents had some legal or equitable interest therein, the issues not being changed and the defendants not claiming any surprise. *Townsend v. Three Lakes Lumber Co.* 654

PARTNERSHIP:

1. **PARTNERSHIP — EVIDENCE—ADMISSIONS OF PARTNERSHIP.** Upon an issue as to the establishment of a partnership, the admission of one partner is not evidence as against the other. *Akers v. Lord*.... 179
2. **PARTNERSHIP — WITHDRAWAL OF MEMBER—EVIDENCE—SUFFICIENCY.** The evidence fails to show that a member had withdrawn from a partnership before the execution of a note to a bank, where there was evidence that he was introduced to the bank as interested in the firm and indorsed prior notes for the firm, subsequent to the alleged withdrawal, that subsequently he agreed to give his services to the firm for one year free, or furnish a man in his place, and the firm paid no rent for a building of his which it occupied, and the other partner denied that he ever ceased to be a member. *Alaska Banking & Safe Deposit Co. v. Simmons*..... 673

PASSENGERS:

Carriage of, see **CARRIERS**.

PAYMENT:

Waiver of forfeiture for nonpayment of dues, see **BENEFICIAL ASSOCIATIONS**, 2.
 Of bill or note, see **BILLS AND NOTES**, 2.
 Corporate license fee, see **CORPORATIONS**, 7, 9, 10.
 Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 4.
 Promise to pay debt of another, see **FRAUDS, STATUTE OF**, 1-4.
 Of taxes as estopping city to claim land as street by dedication, see **MUNICIPAL CORPORATIONS**, 10.
 For land under oral contract to convey, see **SPECIFIC PERFORMANCE**.
 Of income to legatee, see **WILLS**.

PERFORMANCE:

Of promise to make gift, see **GIFTS**, 3.
 Damages on partial performance of logging contract, see **LOGS AND LOGGING**, 1.
 Of building contract, see **MECHANICS' LIENS**, 3.

PERSONAL INJURIES:

To passenger, see **CARRIERS**.
 Damages for, see **DAMAGES**.
 Admissibility of evidence of mental shock in action for, see **EVIDENCE**, 2.

PERSONAL INJURIES—CONTINUED.

To employee, see **MASTER AND SERVANT**.

To person on city street, see **MUNICIPAL CORPORATIONS**, 18, 19.

Caused by operation of street railroad, see **STREET RAILROADS**, 2, 3, 6, 7.

PLEADING:

See **LIBEL AND SLANDER**, 2.

Amendment as harmless error, see **APPEAL AND ERROR**, 23.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

Filing answer after default as appearance, see **JUDGMENT**, 1.

Trial amendment bringing in new parties, see **PARTIES**, 2.

Allowance of amendment by referee, see **REFERENCE**.

To restrain unfair competition in use of trade-name, see **TRADE-MARKS AND TRADE-NAMES**.

Converting legal case into equitable action by answer and cross-complaint, see **TRIAL**, 1.

1. **PLEADING — COMPLAINT — PRAYER—ACTIONS—LEGAL OR EQUITABLE.** In an action at law to recover money, the addition of a prayer for "such other relief as to equity may belong" does not change the nature of the action. *Hotchkin v. McNaught-Collins Improvement Co.* 206
2. **PLEADING—DEMURRER—LEGAL CONCLUSIONS.** A demurrer does not admit facts that may be inferred from a legal conclusion. *Freeman v. Centralia* 142
3. **PLEADING—AMENDMENTS TO CONFORM TO PROOF—SURPRISE — CONTINUANCE.** It is not an abuse of discretion to allow an amendment to conform to proof as to the permanent nature of personal injuries, where the court offered to appoint physicians for a physical examination, with a view to granting a continuance if the examination demonstrated a surprise preventing a fair trial, and defendant failed to avail itself of the offer. *Lindquist v. Seattle*..... 230
4. **PLEADINGS—AMENDMENTS—MISTAKE.** In an action upon an account, in which the defendant alleged an assignment by him and substitution of the assignee, and also sought an accounting alleging a balance due to defendant, plaintiff's failure to reply to the defense of substitution is inadvertence that may be cured by amendment, especially where defendant offered no objection to the appointment of a referee to take the account. *Walsh Lumber Co. v. Chaney*. 583

POLICE POWER:

See **CONSTITUTIONAL LAW**, 1-4.

POLICY:

Of insurance, see **INSURANCE**.

POSSESSION:

Character of to establish title, see **ADVERSE POSSESSION**.

Of mortgaged property, see **CHATTEL MORTGAGES**.

Of stolen property, see **ROBBERY**.

Of bill of sale by seller, see **SALES**, 4.

POWERS:

Of local agent, see **BENEFICIAL ASSOCIATIONS**.

Of state to fix telegraph and telephone rates, see **CONSTITUTIONAL LAW**, 1, 3, 4.

Of county and townships over highways, see **HIGHWAYS**, 1.

Delegation of legislative power to cities, see **MUNICIPAL CORPORATIONS**, 17.

Of court to bring in new parties, see **PARTIES**, 1.

Of public service commission to require increase in rates of telephone company, see **TELEGRAPHS AND TELEPHONES**.

To require attendance of witness, see **WITNESSES**, 4.

PRACTICE:

See **APPEAL AND ERROR**; **CRIMINAL LAW**; **DIVORCE**; **EVIDENCE**; **INJUNCTION**; **JUDGMENT**; **PLEADING**; **PROHIBITION**.

PRAYER:

In pleadings, see **PLEADING**, 1.

PREFERENCES:

By insolvent corporation, see **CORPORATIONS**, 11.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 22-31.

Ground for estoppel, see **ESTOPPEL**, 1.

PREMISES:

Alterations in by lessee, see **LANDLORD AND TENANT**, 3.

PRESCRIPTION:

Acquisition of rights, see **ADVERSE POSSESSION**, 1.

PRESENTMENT:

Of claims against county, see **COUNTIES**.

Of claims against estate of decedent, see **EXECUTORS AND ADMINISTRATORS**, 2, 3.

PRESUMPTIONS:

As to "doing business in county," see **CORPORATIONS**, 8.

As to oral gift, see **GIFTS**, 2.

In criminal prosecutions, see **HOMICIDE**, 7, 8.

PRINCIPAL AND ACCESSORY:

See **CRIMINAL LAW**, 7.

PRINCIPAL AND AGENT:

Local clerk as agent of society, see **BENEFICIAL ASSOCIATIONS**, 1.
Corporate officers and agents, see **CORPORATIONS**, 1, 2, 5, 6.

1. **PRINCIPAL AND AGENT—EMPLOYMENT OF AGENT—BROKERS—EVIDENCE—SUFFICIENCY.** The evidence is sufficient to show that a broker to secure a loan was the agent of the borrower to pay off a prior mortgage on the property, where it appears that he was employed by the borrower for a commission, that the lender, who was to have a first mortgage lien and had no knowledge of the first mortgage, drew a check for the amount of the loan in favor of the broker to enable him to draw the money and obtain his commission, the borrower not being known at the bank, whereupon these two went to the bank to draw the money, it being previously agreed that the broker should discharge all liens on the property; but the mortgage was not discharged, the borrower later conveying the land and leaving the state, and the broker having paid interest on the first mortgage for a time and committed suicide upon the matter being investigated; hence the borrower's grantee is chargeable with payment of the first mortgage. *Moore v. Blackburn*..... 117
2. **PRINCIPAL AND AGENT — SALES AGENT — AUTHORITY—SALES—WARRANTY BY AGENT.** A sales agent of talking machines has no implied authority to guarantee an average number of sales of records for each machine sold, under the rule that there is no implied authority to give a warranty where the warranty is beyond the usage of the business; especially where he carried a printed form of contract without apparent authority to modify it, and which should have put the buyer on inquiry; evidence of a prevailing custom being necessary to sustain such an extraordinary guaranty. *Johns v. Jaycox* 403

PRIORITIES:

Of mortgage lien, see **EXECUTION**.

PROCESS:

On appeal, see **APPEAL AND ERROR**, 8.

1. **PROCESS—SUBSTITUTED SERVICE—NONRESIDENTS—ACTION AS TO CORPORATE STOCK.** Substituted service outside the state upon a non-resident stockholder of a domestic corporation is constructive notice and gives the court jurisdiction of an action to determine the title to the stock, and issuance of an attachment is unnecessary; since the court has jurisdiction of the *res*, and the corporation is protected by the decree, Rem. & Bal. Code, § 3693, providing that no transfer of stock shall be valid until it is entered on the books of the company. *Gamble v. Dawson*..... 72

PROHIBITION:

Of traffic in intoxicating liquors, see **INTOXICATING LIQUORS**.

1. **PROHIBITION—TO COURTS—WHEN LIES—ADEQUACY OF REMEDY BY APPEAL.** The remedy by appeal is inadequate, and prohibition lies to prohibit the superior court from enjoining compliance with an order of the public service commission, where the relator is subject to the penalties for disobedience to the orders of court, on the one hand, and of the order of the commission, if lawfully made, on the other, and in a position of extreme uncertainty. *State ex rel. Webster v. Superior Court*..... 37
2. **PROHIBITION—WHEN LIES—CONTEMPT PROCEEDINGS—ADEQUACY OF REMEDY BY APPEAL—RIGHTS OF WITNESS.** The remedy by appeal is not adequate and prohibition lies, where the court made an order without authority of law requiring a witness to show cause why he should not be punished for contempt in failing to appear for examination, that he made answer showing the illegality of the summons, that the court was about to erroneously punish him for contempt, and before he could appeal from the judgment of contempt he must be fined and possibly illegally taken from one county to another and imprisoned. *State ex rel. Peterson v. Superior Court*..... 370

PROMISE:

To answer for debt of another, see **FRAUDS, STATUTE OF**, 1-4.

To make gift, see **GIFTS**, 3.

PROMISSORY NOTES:

See **BILLS AND NOTES**.

PROPERTY:

Adverse possession, see **ADVERSE POSSESSION**.

Dedication to public use, see **DEDICATION**.

Division of on divorce, see **DIVORCE**, 7, 8.

Taking or damaging for public use, see **EMINENT DOMAIN**.

Extortion of, see **EXTORTION**.

Separate or community property, see **HUSBAND AND WIFE**.

Exempt from taxation, see **TAXATION**, 1.

Wrongful conversion of, see **TROVER AND CONVERSION**.

PROXIMATE CAUSE:

Of injury to servant, see **MASTER AND SERVANT**, 2.

PUBLIC DEBT:

See **MUNICIPAL CORPORATIONS**, 20, 21.

PUBLIC POLICY:

See **CONTRACTS**, 3.

PUBLIC SERVICE COMMISSION:

Construction of act, see **STATUTES**, 1.

Power to increase rates of telephone company, see **TELEGRAPHS AND TELEPHONES**.

PUBLIC USE:

Dedication of property, see **DEDICATION**.

Taking property for public use, see **EMINENT DOMAIN**.

QUESTION FOR COURT:

Construction of promise to pay debt of another, see **FRAUDS, STATUTE OF**, 2.

Variance in criminal prosecution, see **INDICTMENT AND INFORMATION**, 5.

Libel *per se*, see **LIBEL AND SLANDER**, 3.

QUESTION FOR JURY:

See **MASTER AND SERVANT**, 1, 2.

Reasonable cause for prosecution, see **MALICIOUS PROSECUTION**, 1.

Contributory negligence in stepping on defective sidewalk, see **MUNICIPAL CORPORATIONS**, 19.

In action for injury to pedestrian at street crossing, see **STREET RAILROADS**, 2, 3.

Negligence in maintenance of guard rail in car track, see **STREET RAILROADS**, 5.

QUIETING TITLE:

See **TENANCY IN COMMON**.

Limitation on action to vacate default judgment, see **JUDGMENT**, 3, 4.

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**.

RAPE:

1. **RAPE—EVIDENCE—CORROBORATION—NECESSITY—AGE AND PLACE—INSTRUCTIONS.** An instruction in a prosecution for rape that corroboration of the prosecutrix is sufficient if the testimony in any material matter tends to connect the defendant with the commission of the offense, is not objectionable as making it sufficient if she was corroborated as to her age. *State v. Aton*..... 485

RATES:

Regulation of telegraph and telephone rates, see **CONSTITUTIONAL LAW**, 1, 3, 4; **MUNICIPAL CORPORATIONS**, 17.

Construction of act providing for commission to establish rates and charges for public service corporations, see **STATUTES**, 1.

Power of public service commission to require increase in rates of telephone company, see **TELEGRAPHS AND TELEPHONES**.

RATIFICATION:

Of acts of corporate officers, see CORPORATIONS, 6.

REAL PROPERTY:

Liability of abstractor for mistake in abstract, see ABSTRACTS OF TITLE.

Boundaries of, see BOUNDARIES.

Condemnation of, see EMINENT DOMAIN.

Sale of, see EXECUTION; VENDOR AND PURCHASER.

Lease of, see LANDLORD AND TENANT.

Enforcing performance of oral contract for conveyance of, see SPECIFIC PERFORMANCE.

Taxation of, see TAXATION.

Co-tenants of, see TENANCY IN COMMON.

REASONABLE CAUSE:

For prosecution, see MALICIOUS PROSECUTION, 1.

REASONABLE DOUBT:

Instructions, see CRIMINAL LAW, 15.

RECORDS:

On appeal, see APPEAL AND ERROR, 4, 9-11.

Registering transfer of corporate stock on books of company, see CORPORATIONS, 2, 3.

REDEMPTION:

From foreclosure sale, see MORTGAGES, 6; TENANCY IN COMMON.

REDUCTION:

Of capital stock and relief to trustee in bankruptcy on ground of fraud, see LIMITATION OF ACTIONS, 1.

REFERENCE:

1. REFERENCE—APPROVAL OF REPORT—TRIAL—AMENDMENT OF PLEADINGS. A referee to take an account being obliged to receive all the evidence offered, which is returned to the court with the objections and exceptions, the affirmance of a report of the referee, who allowed an amendment to the pleadings, amounts to an allowance of the necessary amendment to admit the proofs received. *Walsh Lumber Co. v. Chaney*..... 583
2. REFERENCE—TRIAL—AMENDMENT OF PLEADINGS. A referee to take an account and hear the case on the merits may allow amendments to the pleadings, subject to review for abuse of discretion only. *Walsh Lumber Co. v. Chaney*..... 583

REGISTRATION:

Of transfer of corporate stock, see CORPORATIONS, 2, 3.

Of voters, see ELECTIONS.

REGULATION:

Rates of telegraph and telephone companies, see CONSTITUTIONAL LAW, 1, 3, 4; MUNICIPAL CORPORATIONS, 17.

REINSTATEMENT:

Of corporation after failure to pay license fees, see CORPORATIONS, 9.

RELEASE:

Of mortgage, see MORTGAGES, 2.

RELEVANCY:

Of evidence in civil actions, see EVIDENCE, 1.

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 32.

REMOVAL OF CAUSES:

Change of venue or place of trial, see VENUE.

RENEWAL:

Of mortgage, see MORTGAGES, 2, 4.

RENT:

See LANDLORD AND TENANT, 5, 6.

REOPENING CASE:

For further evidence, see CRIMINAL LAW, 10.

REPEAL:

Implied repeal of charter, see MUNICIPAL CORPORATIONS, 1.

REPLEVIN:

Right of mortgagee to maintain on default of mortgagor, see CHATTEL MORTGAGES.

REPORT:

On reference, see REFERENCE.

REQUESTS:

For instructions, see CRIMINAL LAW, 19.

RESCISSION:

Sale of corporate stock, see FRAUD.
Of contract of sale, see SALES, 3.

RESERVOIRS:

Condemnation of land for reservoir site, see EMINENT DOMAIN, 1.

RES GESTAE:

In civil actions, see EVIDENCE, 2.

RESIDENCE:

See DOMICILE.

Change of venue to residence of garnishee defendant, see VENUE, 1, 3.

RES IPSA LOQUITUR:

In action for damages from flooding by break in irrigation canal, see WATERS AND WATER COURSES, 4.

RES JUDICATA:

See JUDGMENT, 5-10.

REVIEW:

See APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 18, 19.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 5-7.

ROADS:

See HIGHWAYS.

ROBBERY:

1. ROBBERY—IDENTITY OF ACCUSED—POSSESSION OF STOLEN PROPERTY—EVIDENCE—SUFFICIENCY. A conviction of robbery is sustained where part of the property taken was found in defendant's possession, and he was taken shortly after the robbery in the vicinity where the crime was committed, although there was no direct evidence of identity. *State v. King*..... 651

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 1, 2, 5, 7.

SALES:

Of corporate stock, see CORPORATIONS, 1-3, 6.

On execution, see EXECUTION.

Fraud in sale of corporate stock, see FRAUD.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 5.

Of intoxicating liquors, see INTOXICATING LIQUORS.

On foreclosure of mortgage, see MORTGAGES, 3, 5, 6.

By agents, see PRINCIPAL AND AGENT, 2.

1. SALES—FRAUD—FALSE REPRESENTATIONS — OPINIONS. Where parties were dealing at arm's length, and the seller did nothing to deceive or mislead, representations as to the condition of horses, wagons, and equipment and the cost of putting the same in repair are mere expressions of opinion and not actionable, where the property was at hand and the buyers had every opportunity to make examination and inquiry. *Aurora Land Co. v. Keevan*..... 305
2. SALES — BY SAMPLE — SUBJECT TO INSPECTION — BREACH. Where samples of hops were submitted to the purchaser before sale, a sale

SALES—CONTINUED.

“subject to inspection” means an inspection to determine whether the hops sold were up to the quality of the sample; and upon inspection, a rejection of hops equal to the sample is unwarranted and a breach of the contract. *Gonter v. Klaber & Co.*..... 84

3. **SALES—FRAUD—RESCISSION BY BUYER—LACHES.** A buyer cannot rescind a sale of wagons, teams, and equipment, on account of false representations as to their condition, where nothing was done calculated to deceive, the same were at hand and could have been examined, the condition was fully ascertained a day or two after the sale, and no steps taken to rescind for five months. *Aurora Land Co. v. Keevan*..... 305
4. **SALES—BILL OF SALE—TITLE—RETENTION OF POSSESSION—EFFECT.** A bill of sale reserving a life estate having been delivered and recorded, will pass the title, although the seller retained possession of it until his death. *Jackson v. Lamar*..... 385
5. **SALES—WARRANTY—QUALITY—EVIDENCE—ADMISSIBILITY.** Where hops were sold without knowledge by the seller that they were purchased for a particular purpose, evidence on behalf of the buyer as to such purpose is inadmissible. *Gonter v. Klaber & Co.*..... 84
6. **SALES—WARRANTY—WAIVER.** Where the seller repudiated a guaranty made by his sales agent, and requested a telegram in case the buyer desired the balance of the goods shipped without the guaranty, a telegram directing shipment of the balance as ordered is an acquiescence in the seller's claim, and waives the guaranty, and the buyer cannot thereafter claim that, the guaranty having induced the contract, there could be no contract if the guaranty was void. *Johns v. Jaycox*..... 403
7. **SALES—ACTION FOR PRICE—WARRANTY—EVIDENCE—SUFFICIENCY.** There is no sufficient evidence of a warranty to the defendants by the seller of an aeroplane that it was in good condition and that one W. was an experienced aviator and capable of making flights with the machine at the city of H., where it appears that the machine was sold direct to W. by a bill of sale warranting title only, that defendants assisted W. to purchase the machine by giving the promissory note in suit to W. after the seller of the machine had informed defendants that flights could not be made at the city of H. on account of the unsuitability of the grounds, and defendants relied on the oral representations of W. that he could make the flights. *Pacific Aviation Co. v. Philbrick*..... 414

SAMPLE:

Sale by sample, see SALES, 2.

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Of married women, see HUSBAND AND WIFE, 1.

SERVICE:

Of process, see **PROCESS**.

SIDEWALKS:

Injuries from defects, see **MUNICIPAL CORPORATIONS**, 19.

SIGNATURES:

To mortgage, see **MORTGAGES**, 1, 2.

SODOMY:

Evidence of commission of in prosecution for abortion, see **ABORTION**.

SPECIFIC PERFORMANCE:

Of contract for water for irrigation, see **WATERS AND WATER COURSES**, 2, 3.

1. **SPECIFIC PERFORMANCE—ORAL CONTRACT—PAYMENT AND POSSESSION —EVIDENCE — SUFFICIENCY — DELAY — ESTOPPEL.** While an executed oral contract for the sale of land must be proved by clear, cogent and convincing evidence, it need not be by direct testimony, especially when supplemented by the acts of the parties; and the evidence is sufficient to warrant specific performance, where it appears that, in 1902, plaintiff having orally purchased 1½ acres of wild land for \$30, taken possession, and fully paid for the same, the defendant in 1903 orally agreed to sell an adjoining 2½ acres at the same price, which is the tract in dispute, permitted the plaintiff to fully pay for the same in services, and tendered no deed of the first tract when paid for, nor any pay for services received, allowing plaintiff to expect one deed for the whole tract when fully paid up, that in 1905 the defendant reserved from another sale the 2½ acres, stating to the purchaser thereof that he had sold it to the plaintiff, that in 1910, the plaintiff took possession and started to clear the last tract, which adjoined and was in a sense part and parcel of the other, the land being wild and reducible to cultivation only by great effort; the defendant in such case being estopped to set up plaintiff's delay in demanding a deed or taking possession of the last tract. *Erickson v. Cook*..... 251

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 4, 9, 10.

STATES:

Authority to regulate telephone and telegraph rates, see **CONSTITUTIONAL LAW**, 1.

STATUTES:

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Laws impairing obligation of contracts, see **CONSTITUTIONAL LAW**, 3, 4.

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STATUTES—CONTINUED.

- Laws relating to reinstatement of corporation after failure to pay license fee, see **CORPORATIONS**, 9, 10.
- Laws defining principals and accessories, see **CRIMINAL LAW**, 7.
- Requiring name of witness to be indorsed on indictment, see **CRIMINAL LAW**, 8.
- Damages to widow or children for wrongful death, see **DEATH**.
- False registration, see **ELECTIONS**.
- Embezzlement or alienation of effects of estate, see **EXECUTORS AND ADMINISTRATORS**, 1.
- Statute of frauds, see **FRAUDS, STATUTE OF**.
- Providing punishment for contributing to delinquency of children, see **INFANTS**.
- Construction of local option law as to wholesale dealers, see **INTOXICATING LIQUORS**, 1.
- Limitation of action to vacate judgment in action to recover real property, see **JUDGMENT**, 3, 4.
- Of limitation, see **LIMITATION OF ACTIONS**.
- Provision for logger's lien, time for filing, see **LOGS AND LOGGING**, 3.
- Bonds on public improvements, see **MUNICIPAL CORPORATIONS**, 6.
- Construction of statute requiring claims for personal injuries, see **MUNICIPAL CORPORATIONS**, 22.
- Exempting church property from taxation, see **TAXATION**, 1.

1. **STATUTES—GENERAL LAWS—CONSTRUCTION.** The public utilities act of 1911, p. 538, providing for a public service commission with power to establish reasonable rates and charges for public service corporations, is a "general law," within Const., art 11, § 10, authorizing the adoption of special charters by cities subject to general laws; Const., art. 12, § 18, having required the legislature to establish reasonable maximum rates for railroads and other common carriers, and providing that a railroad commission may be established and its powers defined. *State ex rel. Webster v. Superior Court.* 37
2. **STATUTES—TITLE AND SUBJECTS—AMENDATORY ACTS.** The title "an act to amend an act approved November 13, 1873, entitled an act to provide for the formation of corporations" is sufficient and broad enough to include a provision conferring the right of eminent domain on corporations organized for certain purposes. *State ex rel. Golden Valley Irrigation Co. v. Superior Court*..... 556
3. **STATUTES—TITLE AND SUBJECTS.** The title, an act requiring bonds from contractors on public work conditioned to pay laborers, mechanics, materialmen, and others, is sufficiently broad to include provisions to indemnify parties furnishing "supplies and provisions" for carrying on the work, although such supplies or provisions did not enter into or become a part of the finished improvements; the doctrine of *sui generis* not applying in such case to the words "and others." *National Surety Co. v. Bratnober Lumber Co.*..... 601

STATUTES—CONTINUED.

4. **SAME.** A bond under Rem. & Bal. Code, § 1159, to indemnify laborers, mechanics, subcontractors and materialmen, and all persons supplying such persons with provisions or supplies for carrying on the work, covers fuel for a steam shovel used in excavating; also the services performed by teams with drivers furnished to the contractor, together with hay and grain to feed the horses. *National Surety Co. v. Bratnaber Lumber Co.*..... 601

STOCK:

Unlawful reduction of corporate stock, see **BANKRUPTCY**.

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Conversion of corporate stock, see **TROVER AND CONVERSION**, 2-4.

STOCKHOLDERS:

Of corporations, see **CORPORATIONS**, 1-4, 6.

STREET RAILROADS:

Franchise in city street, see **MUNICIPAL CORPORATIONS**, 16.

1. **STREET RAILROADS—NEGLIGENCE—EVIDENCE—OTHER ACCIDENTS—ADMISSIBILITY.** In an action to recover damages for injury to a horse by reason of its foot being caught between the rail and the guard rail in street car tracks opposite a frog, evidence of similar injuries to other horses on previous occasions at the same place, and at a similar crossing one block distant, is admissible to show the dangerous condition of the track and defendant's knowledge of it. *Blair v. Seattle Electric Co.*..... 465
2. **STREET RAILROADS—NEGLIGENCE—INJURY TO PEDESTRIAN—QUESTION FOR JURY.** The question of the negligence of a street car company, in running down a pedestrian at a street crossing, is for the jury, where it appears that the car passed another standing car taking on passengers at a crossing, traveling at a speed of 25 or 30 miles an hour, the speed limit being 20 miles an hour, that no effort was made to reduce speed until opposite the standing car, in violation of rules of the company, and that the car struck plaintiff on the far crossing after going 51 feet, and traveled 150 feet before it was stopped. *Richmond v. Tacoma R. & Power Co.*..... 444
3. **SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** The contributory negligence of a pedestrian, running across street car tracks on the west side of a street crossing, to catch a waiting car on the tracks on the east side of the street, is for the jury, where plaintiff looked when 45 feet from the track, where he had a view for 200 feet, and saw no street car approaching, but was struck while crossing by a car exceeding the speed limit and traveling 25 or 30 miles an hour; since he need not stop to look and listen; contributory negligence involving affirmative proof of the fact, which is more than a mere failure of required affirmative proof. *Richmond v. Tacoma R. & Power Co.*..... 444

STREET RAILROADS—CONTINUED.

4. **SAME—CONTRIBUTORY NEGLIGENCE OF DRIVER—QUESTION FOR JURY.**
A teamster is not guilty of contributory negligence, as a matter of law, in driving a heavy team over street car frogs and switches at a crossing, from the fact that he knew that it was dangerous and that the calks of other horses had been caught in the groove between the rail and the guard rail, at the same place and at other similar situations, where it appears that the guard rail extended clear across the available space, and he made an effort to avoid passing over the rail at right angles so that there was little danger of being caught. *Blair v. Seattle Electric Co.*..... 465
5. **STREET RAILROADS—INJURY TO HORSE AT CROSSING—TRACKS AND FROGS—GUARD RAILS—NEGLIGENCE—QUESTION FOR JURY.** It cannot be said that a guard rail in street car tracks at a point opposite a frog, forming a groove that was dangerous to horses, was necessary as a matter of law, from the fact that, in the opinion of the expert witnesses, it was necessary to protect certain frogs, where it appears that other similar frogs at the point in question, and at another street car crossing in the city, were not protected by such guard rails; and where it was so maintained that horses could not be well driven around it, negligence in its maintenance was a question for the jury. *Blair v. Seattle Electric Co.*..... 465
6. **STREET RAILROADS—NEGLIGENCE—INJURY TO PEDESTRIAN—VIOLATION OF SPEED ORDINANCE—INSTRUCTIONS.** A pedestrian, struck by a car exceeding the speed limit, is presumed to know the local laws and is therefore entitled to an instruction that he had a right to assume that street cars would not exceed the speed limit in passing the crossing, although there was no evidence that he knew of the ordinance limiting the speed. *Richmond v. Tacoma R. & Power Co.* 444
7. **SAME.** An instruction that plaintiff, struck by a street car at a crossing, had a right to assume that the car would not exceed the speed limit, is not objectionable as relieving the plaintiff from the charge of contributory negligence, where it plainly stated that, yet if such limit was exceeded, he would not be relieved of the obligation to exercise due care. *Richmond v. Tacoma R. & Power Co.*..... 444

STREETS:

See MUNICIPAL CORPORATIONS.

Acquisition of rights in, by prescription, see ADVERSE POSSESSION, 1.
Dedication by estoppel and user, see DEDICATION.

STRIKING:

Of name of corporation from records for failure to pay license fees, see CORPORATIONS, 9, 10.

SUBLETTING:

See LANDLORD AND TENANT, 2, 4.

SUBROGATION:

In action to foreclose logger's lien, see LOGS AND LOGGING, 6.

SUBSTITUTION:

Of mortgage, see MORTGAGES, 2, 4.

SUMMONS:

For appearance of witness, see WITNESSES, 3.

SUPPORT:

Of child, see DIVORCE, 6.

SURRENDER:

Of lease, right to accrued rent, see LANDLORD AND TENANT, 6.

SURVEYS:

To determine boundary lines, see BOUNDARIES, 3.

TAXATION:

Of costs, see COSTS.

Payment of taxes as estopping city from claiming street by dedication, see MUNICIPAL CORPORATIONS, 10.

Purchasers of title from purchaser at foreclosure sale as tenants in common, see TENANCY IN COMMON.

1. **TAXATION—EXEMPTION—CHURCH PROPERTY—PARSONAGE—LOCATION—STATUTES—CONSTRUCTION.** A parsonage and lot, some distance and separated from the church lot, is not exempt from taxation, under Rem. & Bal. Code, § 9098, exempting from taxation all churches supported by donation in which seats are free to all, and the grounds on which such churches are built, not exceeding 120x200 feet in quantity, "together with the parsonage thereon"; especially in view of the rule of strict construction of such exemptions. *Foley v. Oberlin Congregational Church*..... 280
2. **TAXATION—TAX LIENS—CERTIFICATES—FORECLOSURE—VALIDITY—JURISDICTION—EXEMPT PROPERTY.** A tax certificate for the year 1905, upon property which was exempt from taxation that year, is not void so as to furnish no jurisdiction for foreclosure, where the holder, as such, paid taxes for five subsequent years when the property was not exempt, and sought foreclosure of the certificate for the subsequent years, as valid liens; since the certificate was *prima facie* evidence that the property was subject to taxation in 1905, upon which the holder had a right to rely in paying subsequent taxes; the result of which was to transfer to her the county's tax liens for the subsequent years. *Foley v. Oberlin Congregational Church* 280
3. **TAXATION—LIEN—JUDGMENT—COLLATERAL ATTACK.** A tax judgment may be collaterally attacked in a suit to quiet title where the tax has been paid, or the real estate is not subject to taxation, under

TAXATION—CONTINUED.

the express exceptions of Rem. & Bal. Code, § 9267. *Martin v. Rankert* 325

4. **TAXATION—DOUBLE TAX—MISTAKE—TAX TITLE—VALIDITY.** Where land had been assessed for several years under the latest plat, superseding an earlier plat, a duplicate tax resulting from a mistake in again placing the property on the tax rolls under the earlier plat and descriptions, is void, and purchasers at a tax sale thereunder acquire no title. *Martin v. Rankert*..... 325

TELEGRAPHS AND TELEPHONES:

Regulation of rates, see CONSTITUTIONAL LAW, 1, 3, 4.

Control of rates by state legislation, after grant of franchise, see MUNICIPAL CORPORATIONS, 17.

1. **TELEPHONE AND TELEGRAPH COMPANIES—SERVICE—RATES—POWER TO INCREASE—PUBLIC UTILITIES COMMISSION.** Under the public utilities act of 1911, p. 538, authorizing the public service commission to fix reasonable rates and charges for public service corporations which are required to furnish adequate and sufficient services and facilities, the commission has power to require a telephone company to raise its rates above the maximum permitted by its city franchise, where such increased rate has become necessary to provide sufficient revenue to give an adequate service. *State ex rel. Webster v. Superior Court*..... 37

TENANCY IN COMMON:

1. **TENANCY IN COMMON—RIGHTS AND REMEDIES—QUIETING TITLE.** The purchasers of the whole title from a purchaser at a foreclosure sale are not tenants in common of parties to the suit who claimed the right of redemption or an interest which was cut off by the foreclosure sale subject to redemption, and such parties cannot recover an interest as tenants in common, having made no redemption. *Merz v. Mehner*..... 135

TENDER:

By county of compensation for land taken for road, see HIGHWAYS, 2.

TERMINATION:

Right to accrued rent on termination of relation, see LANDLORD AND TENANT, 6.

THREATS:

Securing testimony of accomplice, see CRIMINAL LAW, 6.
Extortion by, see EXTORTION.

TIMBER:

See LOGS AND LOGGING.

TIME:

Filing statement of facts, see **APPEAL AND ERROR**, 10.

Supplemental transcript to show time for taking appeal, see **APPEAL AND ERROR**, 11.

For filing lien on lumber, see **LOGS AND LOGGING**, 3.

TITLE:

Omissions in abstract, see **ABSTRACTS OF TITLE**.

Color of title, see **ADVERSE POSSESSION**, 2.

Cessation of controversy to determine title to office as ground for dismissal of appeal, see **APPEAL AND ERROR**, 3.

Evidence to establish, see **GIFTS**, 2.

Conveyed on foreclosure sale, see **MORTGAGES**, 3.

Effect on by retention by seller of bill of sale, see **SALES**, 4.

Statutes, see **STATUTES**, 2-4.

Tax title, see **TAXATION**, 4.

TOLLS:

Right of boom company to tolls for improving stream, see **LOGS AND LOGGING**, 2.

TORTS:

See **FRAUD; LIBEL AND SLANDER; MALICIOUS PROSECUTION; TROVER AND CONVERSION**.

Measure of damages, see **DAMAGES**.

Causing death, action for damages, see **DEATH**.

Accrual of action for, see **LIMITATION OF ACTIONS**.

Of employers, see **MASTER AND SERVANT**.

TOWNSHIPS:

Powers of officers over highways, see **HIGHWAYS**.

TRADE-MARKS AND TRADE-NAMES:

1. **TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—INJUNCTION—COMPLAINT—SUFFICIENCY.** Although there may be no exclusive right to use a proprietary trade-mark, nor any breach of contract as to good will, yet an injunction will be granted to restrain unfair competition by the fraudulent use of a trade-name, and the complaint states a cause of action, where it appears that a corporation had acquired from a partnership in the restaurant business the right to use the individual name of one of the partners, who had previously built up an enviable reputation and trade at a certain location in the city of S., with the right to conduct the business under such individual name, that such partner afterwards sold out his stock to his former partner, and soon after organized a new corporation and opened up and began conducting another restaurant and cafe in the same city within a block of the old location, with the same individual name printed in large letters on the front door in such a manner as to make the public believe that the old restaurant

TRADE-MARKS AND TRADE-NAMES—CONTINUED.

had moved to the new location, advertising the same in the daily papers and moving picture shows in the same misleading manner, to the plaintiff's damage. *Wright Restaurant Co. v. Seattle Restaurant Co.* 690

TRANSCRIPTS:

Of record for purpose of review, see **APPEAL AND ERROR**, 11.

TRANSFER:

Of corporate stock, see **CORPORATIONS**, 1-3.

TRIAL:

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 4-6.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 9-11.

Review of verdicts and findings, see **APPEAL AND ERROR**, 13-21.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 22-31.

Right to jury trial, see **CONTEMPT**, 1.

Of criminal prosecution, see **CRIMINAL LAW**.

Instructions as to damages for personal injuries, see **DAMAGES**, 1-3, 8.

For personal injuries, see **MASTER AND SERVANT**.

Instructions as to corroboration of testimony, see **RAPE**.

Instructions in action for injury to person struck by street car at crossing, see **STREET RAILROADS**, 6, 7.

Place of trial, see **VENUE**.

1. **TRIAL—RIGHT TO JURY TRIAL—LEGAL ACTION AND EQUITABLE CROSS-COMPLAINT.** The plaintiff is not entitled to a jury trial on issues raised by a complaint in an action to recover damages for breach of a contract, where a defendant, admitting the contract, denied the breach and filed a cross-complaint alleging plaintiff's breach and praying the foreclosure of a trust deed given by plaintiff as security for his performance, since the answer and cross-complaint converted the case into an equitable action. *Nolan v. Pacific Warehouse Co.* 173
2. **TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.** An instruction that the preponderance of the testimony is the excess over the amount necessary to balance the scales, entitling the party furnishing it to a verdict, is proper. *Palmer v. Huston*..... 210
3. **TRIAL—VERDICT—SPECIAL VERDICT.** An answer to a special interrogatory does not require a directed verdict where it did not present the actual issue in the case. *Richardson v. Spokane*..... 621

TROVER AND CONVERSION:

1. **TROVER AND CONVERSION—VALUE OF PROPERTY—EVIDENCE—SUFFICIENCY.** In an action to recover the value of a threshing machine that had been used one season, findings fixing its value at 30 per cent less than its cost are sustained by evidence that it had deteriorated about 30 per cent, in one year's use, although the same witness on cross-examination stated that a lot of harvest machinery would not sell for more than half its cost. *Jackson v. Lamar*..... 385
2. **TROVER AND CONVERSION—DAMAGES—CORPORATE STOCK—VALUE—EVIDENCE—ADMISSIBILITY.** Upon a conversion of all the stock of a private corporation, which had no regular market value, its value may be proven by showing the value of the property and business of the corporation at the date of the conversion over and above its liabilities, to be determined by the value of the stock on hand, rather than the book value of the stock. *Hetrick v. Smith*..... 664
3. **SAME.** In such a case, the accounts receivable should be figured at their face value, where the defendant wrongfully converting the stock notified plaintiff not to make any attempt to collect the accounts. *Hetrick v. Smith*..... 664
4. **SAME—DAMAGES—EVIDENCE.** In an action for conversion of corporate stock, where the plaintiff offered no evidence of the value of the property of the corporation, the value may be assumed from an inventory of the merchandise on hand near the date of the conversion, where two witnesses testified to its correctness and the actual value. *Hetrick v. Smith*..... 664

TRUSTS:

See **LIMITATION OF ACTIONS.**

Conversion by trustee of corporate stock, see **ATTORNEY AND CLIENT.**
 Action by trustee to vacate transaction in fraud of creditors, see **BANKRUPTCY.**

USER:

Dedication by estoppel and user, see **DEDICATION.**

VACATION:

See **JUDGMENT, 3, 4.**

By trustee of transaction in fraud of creditors, see **BANKRUPTCY.**

Of assessment, see **MUNICIPAL CORPORATIONS, 9.**

Of streets, see **MUNICIPAL CORPORATIONS, 11-15.**

VALIDATION:

Of excessive indebtedness, see **MUNICIPAL CORPORATIONS, 21, 22.**

VALUE:

Extortion of check without cash value, see **EXTORTION.**

Evidence as to value of property converted, see **TROVER AND CONVERSION.**

VARIANCE:

In criminal prosecution, see **INDICTMENT AND INFORMATION**, 4, 5.

VENDOR AND PURCHASER:

Purchasers at sale on execution, see **EXECUTION**.

Transfer of ownership of personal property, see **SALES**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

Purchasers of title from purchaser at foreclosure sale, see **TENANCY IN COMMON**.

VENUE:

Harmless error in denying change of, see **APPEAL AND ERROR**, 22.

Of action by claimant to corporate stock, see **CORPORATIONS**, 4.

Actions against corporations, see **CORPORATIONS**, 8.

Administration of community personal property, see **HUSBAND AND WIFE**, 3.

1. **VENUE—CHANGE—GARNISHMENT—RESIDENCE OF GARNISHEE.** Upon default by a nonresident defendant in the main action, a garnishee defendant is entitled to a change of venue to the county of his residence for a trial of the issue in the garnishment. *State ex rel. Stewart & Holmes Drug Co. v. Superior Court*..... 321
2. **VENUE—CHANGE—BIAS OF JUDGE—SUFFICIENCY OF SHOWING.** The fact that a judge on a former trial had decided issues in favor of one party and had been active in promoting a settlement between the parties, does not show bias or prejudice entitling a party to a change of venue on the second trial. *Stahl v. Schwartz*..... 25
3. **VENUE—CHANGE—APPLICATION—AFFIDAVIT OF MERITS—RESIDENCE OF GARNISHEE.** Under Rem. & Bal. Code, § 208, providing that where an action is not brought in the proper county, a trial may be had there unless the defendant files an affidavit of merits and demands a change of venue, an affidavit of merits, in the technical sense, is not necessary upon a demand for a change of venue by a garnishee defendant to the county of his residence, when construed with reference to §§ 207 or 209, authorizing a change of venue when it appears by affidavit that the county designated in the complaint is not the proper county, or when necessary to secure a fair trial, or for the convenience of witnesses. *State ex rel. Stewart & Holmes Drug Co. v. Superior Court*..... 321

VERDICT:

Review on appeal, see **APPEAL AND ERROR**, 13-17.

Inadequate or excessive damages, see **DAMAGES**, 4-7.

Setting aside, see **NEW TRIAL**, 1.

VERIFICATION:

Of claim against county, see **COUNTIES**, 2.

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See **MASTER AND SERVANT**, 5.

VOTERS:

False registration, see **ELECTIONS**.

WAIVER:

See **ESTOPPEL**.

Error waived in appellate court, see **APPEAL AND ERROR**, 23.

Of by-laws of beneficial society, see **BENEFICIAL ASSOCIATIONS**, 2.

Of provisions of policy, see **INSURANCE**, 2.

Of right to lien, see **MECHANICS' LIENS**, 1.

Of excessive claim in lien notice, see **MECHANICS' LIENS**, 4.

Of objections to assessment, see **MUNICIPAL CORPORATIONS**, 9.

Of guaranty, see **SALES**, 6.

Of objections to evidence as to transactions with deceased, see **WITNESSES**, 2.

WARRANTS:

Validity of warrants issued under contract made with city officer, see **MUNICIPAL CORPORATIONS**, 4.

WARRANTY:

Authority of agent to give, see **PRINCIPAL AND AGENT**, 2.

On sale of goods, see **SALES**, 5-7.

WATERS AND WATER COURSES:

Condemnation of land for reservoir site, see **EMINENT DOMAIN**, 1.

1. **WATERS—IRRIGATION—WATER CONTRACT — CONSTRUCTION — AGREEMENT RUNNING WITH LAND.** An agreement for water for irrigation, calling for a certain number of miners' inches for specific tracts of land, which was binding on each parcel of land separate and apart from the others, the conditions to be binding upon heirs and assigns, runs with the land, and places a purchaser of a tract in the situation of the original contractee. *Ulrich v. Pateros Water Ditch Co.* 328
2. **WATERS — IRRIGATION—CONTRACTS—"MINERS' INCHES"—PAROL EVIDENCE—CERTAINTY—SPECIFIC PERFORMANCE.** A contract for a certain number of "miners' inches" of water to be taken from an irrigation ditch is ambiguous, and may be shown by parol evidence to mean in that locality a quantity of water which would flow through an orifice one-inch square under at least a four-inch pressure; and when so explained, is sufficiently definite to admit of specific performance. *Ulrich v. Pateros Water Ditch Co.*..... 328
3. **WATERS—IRRIGATION—WATER CONTRACTS — BREACH — MEASURE OF DAMAGES.** Upon specific performance of a contract to furnish plaintiff five miners' inches of water, to be taken from a ditch at a point most convenient for the irrigation of plaintiff's land, the measure of plaintiff's damages should be interest on his investment at the legal rate from the date of the refusal to furnish water, less the maintenance fee, rather than the remote and speculative profits

WATERS AND WATER COURSES—CONTINUED.

that he might have made from the cultivation of the land, where it appears that his land was some distance from the ditch, the lands were never cultivated and the plaintiff had not constructed his diverting ditches or acquired the right to do so. *Ulrich v. Pateros Water Ditch Co.*..... 328

4. WATERS AND WATER COURSES—IRRIGATION CANAL—DAMAGES FROM FLOODING—NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR. A finding of negligence in attempting to repair an irrigation canal on a hillside, by putting in plank side lining to protect a weakened side, is sustained, and the doctrine of *res ipsa loquitur* applies, where it appears that a mass of earth 12 to 16 feet in thickness and 170 to 180 feet in length, broke from the lower side of the canal, that a few days before the break, defendant undertook to put in a side lining of planks, tamped with a four-inch space of loose earth, that a witness found the earth washed out and soft and notified the defendant that the bank would break, but defendant paid no heed to the warning, and it appears that the court viewed the premises and the break was due to the force of the water and condition of the bank, rather than any outside intervening cause. *Dalton v. Selah Water Users' Association.*..... 589

WAYS:

Public ways, see HIGHWAYS.

WILLS:

Contract for payment of legacy made under misconception of will, see CONTRACTS, 2.

Mistake in construing as ground for equitable relief, see EQUITY.

1. WILLS—CONSTRUCTION—LEGACIES — INCOME — PAYMENT. Under a will making specific legacies to minors to be paid at the age of majority, and giving one-half of the income to plaintiff "during widowhood," hers is a specific legacy, not subordinate to those of the minors, and entitles her to the full income until the minors are paid, and then on the reduced estate until she remarries; and it is immaterial that a direction is made that none of the real estate shall be sold until five years after the testator's death, since that only postpones fulfillment in case of deficiency of personal assets. *Stahl v. Schwartz.*..... 25

WITHDRAWAL:

Of member from partnership, see PARTNERSHIP, 2.

WITNESSES:

Fees as costs, see COSTS.

Testimony of accomplices, see CRIMINAL LAW, 5, 6.

Indorsement of names of on indictment, see CRIMINAL LAW, 8.

Examination of, see CRIMINAL LAW, 11, 14.

WITNESSES—CONTINUED.

Experts, see EVIDENCE, 9.

Evidence to contradict witness, see HOMICIDE, 1.

Impeachment of, see INTOXICATING LIQUORS, 4.

Prohibiting illegal punishment of for contempt, see PROHIBITION, 2.

Corroboration of female in prosecution for rape, see RAPE.

1. **WITNESSES—COMPETENCY — TRANSACTION WITH DECEASED.** In an action on open account against defendant's decedent, it is incompetent, under Rem. & Bal. Code, § 1211, excluding evidence of transactions with the deceased, for plaintiff to testify that the deceased checked over the account and approved it. *Robertson v. O'Neill*. 121
2. **SAME—TRANSACTIONS WITH DECEASED—WAIVER OF OBJECTIONS.** Objections to evidence of the adverse party as to transactions with the defendant's decedent are waived where the defendant, after objection extended the cross-examination beyond the scope of the testimony in chief, introduced evidence on the subject, and called such adverse party as a witness and sought to use his testimony to the extent that it might be beneficial in defeating his claim or establishing a claim in favor of the estate. *Robertson v. O'Neill*..... 121
3. **WITNESSES—SUMMONS—ORDER TO APPEAR—PARTY OR WITNESS.** In an action against a corporation, an order requiring a trustee to appear before the court for examination, concerning the possession of the books and assets of the company, which the receiver was endeavoring to obtain, is a summons as a witness and not as a party, where the trustee was not a party to the suit. *State ex rel. Peterson v. Superior Court*..... 370
4. **WITNESSES—ATTENDANCE — POWER TO REQUIRE — DISTANCE FROM RESIDENCE—CONTEMPT.** Since, under Rem. & Bal. Code, § 1215, a witness cannot be required to appear out of the county in which he resides and more than twenty miles from his residence, the court has no power to punish him for contempt in refusing to obey an order requiring his attendance. *State ex rel. Peterson v. Superior Court* 370
5. **WITNESSES—CROSS-EXAMINATION—CRIMINAL LAW.** Where the accused offered himself as a witness and testified that he had been looking for work and could not find it, it is not error to allow cross-examination showing that he had not had a steady job for some time before the commission of the crime. *State v. King*..... 651
6. **WITNESSES—IMPEACHMENT — DISCREDITING IMPEACHMENT.** A witness having been impeached by his prior inconsistent evidence given before an investigating committee of the city council, may properly be allowed to explain that he at that time believed that the committee had no authority to put him under oath. *State v. Wappenstein* 502

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

Violation by city of eight-hour-day law, see **MUNICIPAL CORPORATIONS**,
3.

WRITINGS:

Parol evidence varying writing, see **EVIDENCE**, 6-8.

Requirements of statute of frauds, see **FRAUDS, STATUTE OF**.

WRITS:

See **EXECUTION; INJUNCTION; PROHIBITION**.

Ex. R. A
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